Supreme Court, U.S.
FILED
MAR 29 2005
OFFICE OF THE CLERK

No. 04-1315

IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD. and MARYANN OSBORNE,

Petitioners,

—v.—

EVELYN COKE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DANIEL S. ALTER, ESQ.*
C/O ALTER & ALTER
300 East 42nd Street, 10th Floor
New York, New York 10017
(212) 867-7777

Counsel for Petitioners

*Counsel of Record

QUESTIONS PRESENTED

1. Whether 29 C.F.R. § 552.109(a)—which has exempted third-party employers of home health care aides from federal minimum wage and overtime pay requirements for the past 30 years—warrants judicial deference and is therefore valid and enforceable.

2. Whether a court may deny *Skidmore* deference to an agency regulation, and thereby invalidate the rule, without first affording interested parties an opportunity to submit evidence in support of the regulation's "power to persuade."

RULE 29.6 STATEMENT

Petitioner Long Island Care at Home, Ltd. has no parent company, and there are no publicly held companies that hold any stock of Long Island Care at Home, Ltd.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY AND REGULATORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
1. The Statutory and Regulatory Scheme	3
2. Litigation History	5
3. The Effects of Invalidating 29 C.F.R. § 552.109(a)	8
REASONS FOR GRANTING THE PETITION	11
1. This Cases Raises Issues of Exceptional Importance	13
2. This Court Needs to Resolve an Important Circuit Split Regarding the Enforceability of 29 C.F.R. § 552.109(a)	15

PAGE

3. The Court of Appeals' Decision Conflicts with the Consistent Decisions of this Court Regarding Judicial Deference to Agency Rulemaking 17

CONCLUSION 27

Appendices:

Appendix A—Decisions and Orders of the United States Court of Appeals For the Second Circuit 1a

Appendix B—Decision of the United States District Court for the Eastern District of New York 36a

Appendix C—Brief of the Secretary of Labor as Amicus Curiae 55a

Appendix D—Sworn Statements Submitted in Support of Petitioners' Motion to Stay the Issuance of the Mandate 79a

TABLE OF AUTHORITIES

Cases: PAGE

Air Brake Sys., Inc. v. Mineta, 357 F.3d 632 (6th Cir. 2004) 23, 26

American Medical Ass'n v. United States, 887 F.2d 760 (7th Cir. 1989) 20

Auer v. Robbins, 519 U.S. 452 (1997) 21

Barnhart v. Walton, 535 U.S. 212 (2002) 15, 21, 22

Boesche v. Udall, 373 U.S. 472 (1963) 22, 25

Brown v. United States, 327 F.3d 1198 (D.C. Cir. 2003) 23

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) ..... *passim*

Christensen v. Harris County, 529 U.S. 576 (2000) 18, 21

Chrysler Corp. v. Brown, 441 U.S. 281 (1979) .. 18

Coke v. Long Island Care at Home, Ltd., 267 F. Supp. 2d 332 (E.D.N.Y. 2003), *aff'd in part and rev'd in part*, 376 F.3d 118 (2d Cir. 2004) 15

Edelman v. Lynchburg College, 535 U.S. 106 (2002) 18, 22

Johnson v. Volunteers of America, Inc., 215 F.3d 559 (10th Cir. 2001) 12, 15, 16

PAGE

Madison v. Resources for Human Dev., Inc., 39 F. Supp. 2d 542 (E.D. Pa. 1999)..... 16

Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294 (1933)..... 22

Olmstead v. Zimring, 527 U.S. 581 (1999)..... 15

Pesquera Mares Australes Ltda. v. United States, 266 F.3d 1371 (Fed. Cir. 2001) 16

Rice v. Souix City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955)..... 13

Skidmore v. Swift & Co., 323 U.S. 134 (1944)...*passim*

Thomas Jefferson University v. Shalala, 512 U.S. 504 (1994) 18, 21

Terwilliger v. Home of Hope, Inc., 21 F. Supp. 2d 1294 (N.D. Okla. 1998) 16

Udall v. Tallman, 380 U.S. 1 (1965)..... 22

United States v. City of Fulton, 475 U.S. 657 (1986) 25

United States v. Mead Corp., 533 U.S. 218 (2001).....*passim*

United States v. Shimer, 367 U.S. 374 (1961) ... 25

Statutes, Rules, & Regulations:

5 U.S.C. § 553(b)(3)(A) 20

29 U.S.C. § 213(a)(15) .....*passim*

29 C.F.R. Part 552 20

PAGE

29 C.F.R. § 552.2(c) 18

29 C.F.R. § 552.3 (2003) 4

29 C.F.R. § 552.6 (2003) .....*passim*

29 C.F.R. § 552.109(a) (2003) .....*passim*

Statutory & Regulatory History:

H.R. Conf. Rep. No. 93-953 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2862 4

39 Fed. Reg. 35,382 (Oct. 1, 1974) 4, 5

40 Fed. Reg. 7404 (Feb. 20, 1975) 4, 5

66 Fed. Reg. 5481 (Jan. 19, 2001) 21

67 Fed. Reg. 16,668 (April 8, 2002) 24

Petitioners Long Island Care at Home Ltd. and Maryann Osborne ("Petitioners") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 376 F.3d 118. (1a-30a).[1] The opinion of United States District Court for the Eastern District of New York is reported at 267 F. Supp. 2d 332. (36a-54a).

JURISDICTION

The judgment of the court of appeals was entered on July 22, 2004. A petition for rehearing with suggestion for rehearing *en banc* was denied on January 10, 2005 (31a-32a). Petitioners' motion to stay issuance of the mandate was granted by the court of appeals on March 22, 2005. (33a-35a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. In pertinent part, section 13(a)(15) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 213(a)(15) ("§ 213(a)(15)") provides:

> (a) Minimum wage and maximum hour requirements
>
> The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and

[1] Numbers followed by the letter "a" within parentheses indicate page references to the appendix to this petition.

section 207 of this title shall not apply with respect to—

(15) any employee . . . employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary [of Labor]).

2. In pertinent part, 29 C.F.R. § 552.3 provides:

Domestic service employment.

As used in section 13(a)(15) of the Act, the term *domestic service employment* refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. * * *

3. In pertinent part, 29 C.F.R. § 552.6 provides:

Companionship services for the aged or infirm.

As used in section 13(a)(15) of the Act, the term *companionship services* shall mean those services which provide fellowship, care, and protection for a person who, because of advanced age or infirmity, cannot care for his or her own needs. * * *

4. In pertinent part, 29 C.F.R. § 552.109(a) provides:

Third party employment.

(a) Employees who are engaged in providing companionship services as defined in [29 C.F.R.] § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15). * * *

STATEMENT OF THE CASE

This case concerns whether the Labor Department regulation governing the application of federal minimum wage and overtime pay requirements to home health care workers employed by health care agencies warrants judicial deference and is valid. Rejecting the holdings of every other court to consider the issue, including that of another circuit, the court of appeals invalidated a keystone regulation for the home health care community that has been in place for more than 30 years.

1. The Statutory and Regulatory Scheme

In 1974, Congress extended the FLSA's minimum wage and overtime pay requirements to include "domestic service" employees. *See* Fair Labor Standards Amendments of 1974, PL 93-259, § 7, 55 Stat. 88 (1974). Congress simultaneously excluded from such coverage, however, "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves . . ." *Id.* (codified at 29 U.S.C. § 213(a)(15)). Congress defined neither "domestic service employment" nor "companionship services," but instead left the specification of those terms entirely to the Department of Labor. *See id.* (leaving exemption's application "as such terms are defined and delimited by regulations of the Secretary"). Indeed, as reflected in the House Conference Report, Congress "expect[ed] the Secretary to immediately undertake a program utilizing all feasible administrative procedures to apprise employers of their responsibilities under the Act and to notify employees of their rights and entitlements under the Act." H.R. Conf. Rep.

No. 93-953 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2862, 2865.[2]

The Secretary complied. The Department of Labor commenced a formal notice-and-comment rule making proceeding in October 1974. *See* 39 Fed. Reg. 35,382 (Oct. 1, 1974). In February 1975, the agency promulgated regulations governing the application of the FLSA to domestic service employees. *See* 40 Fed. Reg. 7404 (Feb. 20, 1975).

For the purposes of applying § 213(a)(15), the Secretary defined "domestic service employment" to mean "services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." 29 C.F.R. § 552.3.[3] The Secretary likewise defined "companionship services" to mean "those services which provide fellowship, care, and protection for a person who, because of advanced age or infirmity, cannot care for his or her own needs." 29 C.F.R. § 552.6.[4] Finally,

---

[2] The Secretary was also instructed by the Conference Committee to "adopt regulations and enforcement procedures to require that employers are reasonably apprised of when their obligation regarding the payment of the minimum wage commences." H.R. Conf. Rep. No. 93-953 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2862, 2865.

[3] 29 C.F.R. § 552.3 further states that "domestic service employment" includes "employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. It also includes babysitters employed on other than a casual basis. This listing is illustrative and not exhaustive."

[4] In addition, the regulation explains that "[s]uch services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services." 29 C.F.R. § 552.6. Furthermore, although

the agency's regulations directed that "[e]mployees who are engaged in providing companionship services as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15)." 29 C.F.R. § 552.109(a).[5]

These regulations have been in place since 1975. Since then, Congress has amended § 213 of the FLSA seven times, and it has never suggested any disapproval for § 552.109(a).

2. Litigation History

In 2002, respondent Evelyn Coke ("Respondent") commenced this action in the United States District Court for the Eastern District of New York. (36a). Respondent alleged that "she was employed as a 'home

---

employees performing "companionship services" may also perform "general household work," the regulation makes clear that such work must be "incidental, *i.e.*, [that it] does not exceed 20 percent of the total weekly hours worked." *Id.* Finally, the regulation states that the "term 'companionship services' does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse." *Id.*

[5] The final version of 29 C.F.R. § 552.109(a) promulgated by the Department of Labor—which exempts home health care workers employed by third-party employers from federal minimum wage and overtime pay requirements—differed significantly from the original version that appeared in the agency's notice of proposed rulemaking. The first version of the regulation did not exempt third-party employees from the requirements of the FLSA. *See* 39 Fed. Reg. 35,382 (Oct. 1, 1974). Upon further consideration, however, the agency changed its view and explained that the FLSA's companionship services exemption could be "available to . . . third party employers since they apply" under § 213(a)(15) "to 'any employee' engaged 'in' the enumerated services." 40 Fed. Reg. at 7405.

health care attendant' by [Petitioners], who did not pay her minimum wage or overtime compensation." (4a, 37a-38a). Although Respondent maintained that "she was entitled to" such compensation under the FLSA (38a), she conceded that "the 'companionship services' exemption to the FLSA, as defined and interpreted by [Department of Labor] regulations, applie[d] to her employment and that if the regulations at issue [were] enforceable, she [could] not prevail." (5a). Respondent stated that "the purpose of this action was to determine the validity of" 29 C.F.R. §§ 552.6 and 552.109(a) (37a), and described this litigation as "a test case" (5a).[6]

Petitioners moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, invoking the FLSA exemption implemented by 29 C.F.R. §§ 552.6 and 552.109(a). (36a-37a). Respondent opposed the motion by arguing that both regulations were invalid because they were "inconsistent with Congress's intent of extending coverage of the FLSA to domestic service employees." (42a). Specifically, Respondent asserted that "the definition of 'companionship services' in Section 552.6 [was] overbroad and that Section 552.109(a) improperly extend[ed] the [minimum wage and overtime pay] exemption to employees who are employed by an agency." (42a-43a).

The district court rejected Respondent's arguments. Applying the standard of review for administrative action laid down in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"), the district court afforded §§ 552.6 and 552.109(a) the highest level of judicial deference. (44a-

---

[6] Respondent's complaint also asserted "identical" claims "under the Labor Law of the State of New York and the New York Minimum Wage Act." (38a).

52a). The district court recognized that Congress had expressly delegated to the Secretary of Labor the authority to define and delimit the terms contained in § 213(a)(15) (37a), and that §§ 552.6 and 552.109(a) embodied a long-standing, contemporaneous construction of the statute by the agency charged with its administration (45a-46a). After reviewing the relevant statutory and regulatory history, as well as the existing case law addressing the validity of §§ 552.6 and 552.109(a), the district court concluded that the regulations were a reasonable construction with of FLSA. (52a). The court therefore held that §§ 552.6 and 552.109(a) carried the force of law and granted Petitioners' motion for judgment on the pleadings. (54a).

On appeal, the Second Circuit affirmed the district court's decision in part and reversed in part. (4a). Applying *Chevron*, the court of appeals upheld 29 C.F.R. § 552.6. (3a). Petitioners do not seek review of that holding.

Unlike the district court, however, the court of appeals invalidated 29 C.F.R. § 552.109(a). (3a-4a). In so doing, the Second Circuit again began its analysis by applying *Chevron*. Guided by this Court's ruling in *United States v. Mead Corp.*, 533 U.S. 218 (2001) ("*Mead*")—that an agency regulation "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority," *id.* at 226-27—the court of appeals decided that such deference was unwarranted here.[7] The Second Circuit rested this determination upon two considerations. First, the

[7] Notably, the court did *not* hold that § 552.109(a) was inconsistent with the plain language of the statute.

court noted that the Department of Labor had placed § 552.109(a) within a regulatory subpart entitled, "Interpretations" rather than under the heading of "General Regulations." (22a). Second, the court emphasized that the Department of Labor did not list § 552.109(a) among those regulations " 'required by' " § 215(a)(15). (23a). On those bases, the court concluded that "§ 552.109(a) does not qualify for *Chevron* deference because, by the [agency's] own account, it was self-consciously not promulgated in the exercise of Congress's delegated authority pursuant to § 215(a)(15)." (*Id.*).

The court of appeals then set out to determine whether § 552.109(a) should nevertheless receive judicial deference under what it characterized as *Mead*'s "vague prescription to 'tailor deference to variety,' " and considered whether § 552.109(a) had the " 'power to persuade' " under the standard set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) ("*Skidmore*"). (25a). Upon examining several factors, the court of appeals held that the regulation was invalid because it was inconsistent with legislative intent, other Department of Labor regulations, and the agency's actions over time. (26a). The court further concluded that the Department of Labor—which had submitted an *amicus* brief on appeal arguing that the challenged regulations warranted *Chevron* deference—had failed to "proffer valid reasoning in support of § 552.109(a)'s enforceability." (*Id.*).

Accordingly, the Second Circuit gave no deference whatsoever to the Labor Department's considered judgment.

3. The Effects of Invalidating 29 C.F.R. § 552.109(a)

Petitioners currently employ approximately forty home health care aides, who provide companionship services to approximately thirty homebound patients. (79a).

Pursuant to § 552.109(a)'s exemption from federal minimum and overtime wage requirements, Petitioners pay their employees $8.00 per hour for an average 70-hour work week, or approximately $560.00 per week. (79a-80a). Without § 552.109(a)'s exemption, however, Medicaid reimbursement limitations on home health care services will create tremendous and unsustainable losses for Petitioners and many other agency employers of home health care workers. (80a, 84a (invalidation of § 52.109(a) "will have serious negative impact on the access and quality of care for tens of thousands of older and disabled individuals receiving services . . . based upon significant increased costs for home care services, costs that cannot be absorbed by a financially fragile health care sector that disproportionately relies on government reimbursement")).

To avoid such losses, Petitioners must now limit each employee's workweek to forty hours, thereby avoiding higher overtime pay rates. (80a). Petitioners may also be forced to reduce hourly wages. (*Id.*). In consequence, most of Petitioners' employees will suffer an average 43% weekly salary reduction. (*Id.*).

This hardship will not be limited to Petitioners' employees. Industry experts and major home health care providers agree that home health care workers across New York State will likewise suffer. (103a, 92a-93a, 128a-133a). "While elimination of the third-party employer exemption would increase overtime rates for home care workers, information from agencies throughout New York State establishes that it would not increase—and in many cases would reduce—actual earnings for workers." (1132a).

But the impact of the Second Circuit's ruling extends much farther. As an unavoidable consequence of § 552.109(a)'s invalidation, thousands of homebound

elderly and infirm people will receive compromised care. In order to compensate for the lost exemption, home health care agencies must limit the number of hours that each employee may work. Hence, patients will have to accept services from a greater number of workers, each of whom will work fewer hours. According to both home health care providers and state regulators, this scenario will generate serious problems affecting care.

The relationship between patient and home care aide is intimate and confidential. "The home attendant spends up to 24 hours each day in a client's home, tending to needs of an extremely personal nature, such as bathing or toileting." (96a-97a). It usually takes considerable time to establish the necessary trust and comfort level between caregiver and client, "and clients often are very unwilling to enter into such a relationship with more than one or two such individuals." (97a; *see also* 81a).

Consequently, the need to use multiple caregivers for an individual client often creates a "troubling dynamic" that "assaults the dignity of patients, undermines the quality of care that they receive, and is therefore detrimental to their well being." (79a; *see also* 97a ("Experience shows that clients often are unwilling to accept alternative coverage when a home attendant takes vacation or sick leave, preferring to suffer lack of what may often be very necessary care until the person with whom the client is comfortable returns from leave.")). This problem is further compounded by the fact that there are likely only a limited number of home care workers who will accept shortened work shifts at multiple work sites, thus leaving many patients unattended for hours. (103a). In such circumstances, "home care patients would either be denied some periods of care or receive care with less continuity," *i.e.*, patients would be forced to receive ser-

vices from multiple health care workers. (*Id. see also* 132a).

Either outcome is problematic. Depriving homebound individuals of needed care and companionship is an unacceptable option. So is the idea of using multiple workers to provide care for a single patient. "Continuity of care is so widely recognized to affect the quality of patient care that New York State regulation requires home care agencies to ensure continuity of care to the extent possible." (132a (citation omitted)). But, by creating this Hobson's choice, the decision of the court of appeals has placed the home health care community in an impossible situation—endangering the well-being of thousands of patients and workers alike.

REASONS FOR GRANTING THE PETITION

By invalidating § 552.109(a), the court of appeals jettisoned *thirty* years of administrative practice, congressional acquiescence, judicial approval, and labor-market structure. This ruling will have a profoundly negative impact on the home health care sector. The delicate equilibrium fostered by § 552.109(a) is a critical component in sustaining the ability of home health care providers to supply much needed services to many thousands of elderly and infirm individuals. In the absence of this regulation, an entire community of patients and caretakers will be thrust into sudden and dangerous disarray. This result will hurt everyone affected.

Because the public funding that pays for these services is both strictly limited and shrinking (102a, *see also* 85a-86a; 129a), the Second Circuit's ruling has already disrupted the way in which tens of thousands of homebound people residing in New York State (and possibly many thousands more living in other regions) receive impor-

tant health care assistance. It has also significantly decreased the availability of work for home health care aides and their attendant income. In combination, these consequences threaten the important public policy favoring home care—in many cases leaving institutionalization as a patient's only available health care option, despite its higher economic costs and its enormous toll on patients' quality of life.

This Court should grant the petition for three compelling reasons. First, this case raises issues of exceptional importance regarding the proper allocation of hundreds of millions of dollars each year in federal, state, and local funding for health cares services. The impact of this ruling on the care provided to homebound people, and the economic well being of their immediate care providers, also raises matters of exceptional importance. Indeed, the court of appeals' ruling affects the fundamental viability of home health care as an option to institutionalization, which is an issue of extreme importance for all parties involved.

Second, the decision below directly conflicts with the decision of the Tenth Circuit in *Johnson v. Volunteers of America, Inc.*, 215 F.3d 559 (10th Cir. 2001), which upheld § 552.109(a) under *Chevron*. The application of federal minimum wage and overtime pay requirements to home health care workers, and the impact that those requirements have on the provision of such important services, should not vary between federal judicial circuits.

And third, the judgment of the court of appeals departs from the consistent decisions of this Court regarding judicial deference to agency rulemaking. The Second Circuit's misapplication of *Chevron* and *Mead* evades the Department of Labor's manifest intent to exercise its statutory authority in defining the boundaries of

§ 213(a)(15)—rewriting those boundaries as that court saw fit. Moreover, the court of appeals' misapplication of *Skidmore* puts in jeopardy the efficacy of many administrative decisions that warrant some but not controlling deference from the courts. The Second Circuit invalidated § 552.109(a) under *Skidmore* at the pleading stage of these proceedings, without any consideration of facts that support the agency's judgment. Guidance to the lower federal courts as to the necessary development and the proper scope of a factual record when determining a regulation's "power to persuade" would be of great benefit in a wide variety of cases involving the intersection of *Chevron*, *Mead*, and *Skidmore*.

1. This Case Raises Issues of Exceptional Importance

The fundamental question presented by this case—whether § 552.109(a) is valid and enforceable—undeniably raises issues of exceptional importance. The "problem" created by the court of appeals' invalidation of § 552.109(a) reaches far "beyond the academic or episodic." *Rice v. Souix City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). It will have a staggering impact on home health care costs throughout this region, and it will force largely government-funded agencies to restructure their business operations in ways that will seriously harm their patients and employees.

For example, New York City alone estimates that the Second Circuit's decision will "increase the cost of the City's Medicaid-funded personal care program to the elderly and disabled by over $263 million annually." (93a). Consequently, the city's "Medicaid funding will need to increase from $1.592 billion to about $1.855 billion annually in order to sustain its current client services." (*Id.*). Indeed, across New York State, home care

agencies "cannot bear the cost of compliance with the [Second Circuit's] holding without additional revenues from external sources, which are unlikely to be forthcoming." (102a).

Furthermore, one health care expert has identified a serious harm to the broader health care system that will flow from invalidating § 552.109(a). She observes that, "[b]y creating disruptions in the continuity of care by home health agencies, the [Second Circuit's] decision impairs the ability of hospitals to discharge patients to more appropriate home and community settings in a timely manner, and thus increases the average length of stay and creates a new financial burden on already financially fragile acute care institutions." (86a-87a). She estimates that "a one day increase in the length of stay for patients in New York hospitals that are discharged to home health agencies would cost the health care system $96 million." (*Id.*).

The human toll of this ruling is likewise costly. The added strain on municipal, county, and state budgets triggered by the invalidation of § 552.109(a) will upset the "delicately balanced system that makes home care—a desired alternative to institutionalization—an affordable and safe option for tens of thousands of home care patients in New York State." (103a). Health care experts fear that, without adequate government funding, home care agencies "will be unable to continue providing quality, affordable companionship services to elderly and infirm patients throughout New York." (101a). Consequently, there is deep concern that the increased expense of such services will "undermine New York's commitment" to home care as a feasible option to institutionalization. (87a-88a; *see also* 103a ("Many patients may be forced into nursing homes if home care providers can no longer assure adequate and safe services.")).

Also disturbing are the serious hardships that home health care workers will unavoidably sustain as a result of the court of appeals' decision. The invalidation of § 552.109(a) will necessarily result in slashed income, scheduling changes, and workplace dislocations, as health care agencies try to stretch limited government funding in order to cover demands for care. (80a, 84a, 88a, 92a-97a, 101a-104a, 130a-133a). In a bitter twist, the Second Circuit's ruling will effectively penalize the very category of workers that Respondent purports to represent. (130a-131a).

This case warrants *certiorari* review. Simply put, "in view of the importance of the question presented to the [government programs] and affected individuals," *Olmstead v. Zimring*, 527 U.S. 581, 596 (1999) (granting *certiorari* to review construction of federal regulations requiring major reallocation of state resources for community care of mentally disabled), and in view of its tremendous financial ramifications, *see, e.g., Barnhart v. Walton*, 535 U.S. 212, 217 (2002) (granting *certiorari* where invalidation of social security regulation would have "create[d] additional Social Security costs of $80 billion over ten years"), this Court should grant the petition.

2. This Court Needs to Resolve an Important Circuit Split Regarding the Enforceability of 29 C.F.R. § 552.109(a)

By invalidating § 552.109(a), the Second Circuit extended the FLSA's minimum wage and overtime pay requirements to homecare workers employed by health care agencies. In *Johnson v. Volunteers of America, Inc.*, 215 F.3d 559 (10th Cir. 2001) ("*Johnson*"), however, the Tenth Circuit squarely held that § 552.109(a) was entitled to *Chevron* deference and upheld the application of § 213(a)(15)'s exemption from those FLSA requirements

to *all* home health care aides—whether employed directly by patients or by third parties. *See* 215 F.3d at 562. These two decisions are in direct conflict and create an untenable situation.[8]

The consistency (and thus quality) of care for homebound people across the country cannot turn upon the inconsistent enforcement of federal regulations. The availability of crucial health care services and the structure of homecare delivery systems should not vary between even two federal judicial circuits *because of* a disagreement among judges over the status of federal law. The ramifications of this disagreement are both unfair and inefficient. Too many lives are profoundly affected by § 552.109(a), and too many limited public resources are allocated according to its directive, for this Court to leave unresolved the conflict created by the Second Circuit. *Certiorari* review is especially warranted here.[9]

---

[8] Every district court that has considered § 552.109(a) has likewise enforced the regulation. *See Coke v. Long Island Care at Home, Ltd.*, 267 F. Supp. 2d 332, 341 (E.D.N.Y. 2003) (37a); *Madison v. Resources for Human Dev., Inc.*, 39 F. Supp. 2d 542, 545 n. 3 (E.D.Pa. 1999); *Terwilliger v. Home of Hope, Inc.*, 21 F. Supp. 2d 1294, 1299 n. 2 (N.D.Okla. 1998).

[9] The court of appeals tried to downplay its split with the Tenth Circuit by noting that *Johnson* was decided one year before this Court's decision in *Mead*. (21a-22a). But *Mead*'s gloss on *Chevron* neither explains nor ameliorates the circuit conflict created by the Second Circuit's invalidation of § 552.109(a). In *Mead*, this Court expressly stated that it had left the *Chevron* rule as it was found, *see Mead*, 533 U.S. at 237-38, *see also id.* at 250 (Scalia, J., dissenting), and other courts have likewise understood *Mead* to have simply "reaffirmed" a "well established principle," *Pesquera Mares Australes Ltda. v. United State*, 266 F.3d 1372, 1380 (Fed. Cir. 2001). Consequently, *Mead* is not an intervening change in law that might diminish the discrepancy in law between the Second and Tenth Circuits.

(*footnote continued*)

3. The Court of Appeals' Decision Conflicts with the Consistent Decisions Of this Court Regarding Judicial Deference to Agency Rulemaking

In *Mead*, this Court held that the

> administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and the agency interpretation claiming deference *was promulgated in the exercise of that authority.*

533 U.S. at 226-27 (emphasis added).

Here, the court of appeals did not dispute that Congress gave the Department of Labor authority to promulgate § 552.109(a). But the court below did dispute that § 552.109(a) satisfies the second prong of *Mead*'s directive. The Second Circuit concluded that "§ 552.109(a) does not qualify for *Chevron* deference because, by the [agency's] own account, it was self-consciously not promulgated in the exercise of Congress's delegated authority pursuant to § 213(a)(15)." (23a). The opposite is true. Contrary to the Second Circuit's assertion, the Department of Labor has consistently and openly maintained that it exercised its statutory authority in promulgating § 552.109(a).[10]

In any event, the practical reality demonstrates the significance of this conflict. § 552.109(a) is still enforceable in the Tenth Circuit and, in that region, homecare is being provided under that regulatory regime. If *Mead* somehow affected the validity of the Tenth Circuit's decision in *Johnson*, it is important that this Court grant *certiorari* in this case and say so. The equitable provision of social services requires the consistent application of federal law.

[10] This determination is the lynchpin of the court of appeals' holding and it rests upon two basic mistakes. First, the court of appeals overemphasized the agency's inclusion of § 552.109(a) within

Perhaps the agency's most obvious assertion of statutory authority appears in § 552.109(a) itself. The regulation expressly extends the FLSA's minimum wage and overtime pay exemptions to third party employers "*by virtue of section [2]13(a)(15).*" 29 C.F.R. § 552.109(a)

Subpart B of the regulations, entitled "Interpretations." (23a). Based largely upon this heading, the court of appeals inferred that § 552.109(a) is an "interpretive" rather than a "legislative" regulation, and therefore does not qualify for *Chevron* deference. (22a). This characterization is deeply flawed. As the court of appeals itself acknowledged (22a-23a), § 552.109(a) affects individual rights and obligations, which is an "important touchstone for distinguishing those rules that may be 'binding' or have the 'force of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (describing "legislative-type" rules). Moreover, the dichotomy upon which the court of appeals relies in this case is suspect, given this Court's recent statement that, "[o]f course, the framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *see also Edelman v. Lynchburg College*, 535 U.S. 106, 123-24 (2002) (O'Connor, J., concurring in the judgment).

Second, because § 552.109(a) is not among the definitions listed in 29 C.F.R. § 552.2(c), the court of appeals reasoned that the agency had "effectively conceded" that § 552.109(a) was not promulgated under § 213(a)(15). (23a). This conclusion is also incorrect. § 552.109(a)'s exemption from FLSA requirements applies solely to "[e]mployees who are engaged in companionship services"—a category of employees specifically defined in 29 C.F.R. § 552.6. *See* 29 C.F.R. § 552.109(a). The definition contained in 29 C.F.R. § 552.6 *is* one of the definitions listed in 29 C.F.R. § 552.2(c). Thus, § 552.109(a) governs the application of a regulatory definition that the agency undeniably promulgated under § 213(a)(15). This close connection between § 552.109(a) and the Department of Labor's undisputed exercise of statutory authority belies any supposed concession by the agency that § 552.109(a) was not likewise promulgated. At worst, the interrelationship among 29 C.F.R. §§ 552.2(c), 552.6, and 552.109(a) makes the legislative status of § 552.109(a) ambiguous—an ambiguity that is dispositively settled by the agency's own reasonable interpretation. *See Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994); *see also infra* at 21-22.

(2003) (emphasis added). Thus, the very text of § 552.109(a) makes clear that the Department of Labor drew its regulatory authority straight from the statute.

The Code of Federal Regulations elsewhere supports this reading. Beneath the list of regulations contained in subparts A and B is a section that identifies the source of authority for *all* of Part 552. The statement reads:

> AUTHORITY: Secs. 13(a)(15) and 13(b)(21) of the Fair Labor Standards Act, as amended (29 U.S.C. 213(a)(15), (b)(21)), 88 Stat. 62; sec. 29(b) of the Fair Labor Standards Amendments of 1974 (Pub. L. 93-259, 88 Stat. 76), *unless otherwise noted.*

29 C.F.R. Part 552 (2003) (emphasis added), at page 253. Besides this unequivocal reference to § 213(a)(15), Part 552 identifies no other authority for § 552.109(a). The inference is therefore unavoidable; the Department of Labor promulgated § 552.109(a) pursuant to § 213(a)(15).

Indeed, that "such authority was invoked" by the Department of Labor, *Mead*, 533 U.S. at 237, is again confirmed by the agency's 1974 Notice of Proposed Rulemaking for Employment of Domestic Services' Employees ("1974 NPR"). In relevant part, the 1974 NPR states:

> To implement the 1974 Amendments [to the FLSA], it is proposed to . . . add a new 29 C.F.R. Part 552 defining and delimiting, in Subpart A, the terms . . . "employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves," and setting forth, in Subpart B, a statement of policy and interpretation concerning the application of the [FLSA] to domestic service employees. *These . . . additions are proposed pursuant to the authority in section[ ] . . . [2]13(a)(15) of the [FLSA], as amended.*

39 Fed. Reg. 35,382, 35,382 (Oct. 1, 1974) (emphasis added). § 552.109(a) was one of the "additions" to 29 C.F.R. Part 552 identified by the 1974 NPR, albeit in a form that was substantially different from its final version.[11]

Over 25 years later, the Department of Labor once again reaffirmed its deliberate exercise of statutory authority. In January 2001, the agency proposed to amend § 552.109(a). The Notice of Proposed Rulemaking ("2001 NPR") made plain that the proposed amendment was

> issued *under the authority provided by section 13(a)(15)* of the FLSA (29 U.S.C. 213(a)(15)), which grants the Secretary of Labor *legislative rulemaking authority* to define and delimit the terms "employee employed in domestic services" for the

---

[11] Because the final version of § 552.109(a) contained the opposite rule than was originally proposed in the 1974 NPR, the court of appeals expressed "concern" in *dictum* as to whether the agency's rulemaking notice was sufficient under the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(b)(3)(A). (21a). This concern was unfounded.

The critical APA inquiry here is whether "parties affected by the final rule were put on notice that their interests were at stake," or, stated differently, "whether potential commentators would have known that an issue in which they were interested was on the table and was to be addressed by a final rule." *American Medical Ass'n v. United States*, 887 F.2d 760, 768 (7th Cir. 1989) (internal quotation marks omitted). It is "irrelevant whether the proposal contained in the NPR was favorable to a particular party's interest," because "the obligation to comment is not limited to those *adversely* affected by the proposal." *Id.* (emphasis in original).

The Labor Department's promulgation of § 552.109(a) satisfied this standard. The 1974 NPR surely put the world on notice that an FLSA exemption for third party employers was "on the table" and "open[ ] for discussion." *Id.* at 768-69 (internal quotation marks omitted). Hence, the regulation is procedurally valid under the APA.

> purposes of exempting such workers from the minimum wage and overtime pay requirements of the FLSA.

66 Fed. Reg. 5481, 5487 (Jan. 19, 2001) (emphasis added). This straightforward proclamation of legislative rulemaking dispels any doubt that the Department of Labor used its statutory authority in promulgating § 552.109(a).

But even assuming that there remains in the regulatory history some lingering uncertainty as to the agency's intentions vis-à-vis § 552.109(a), the decision below still veers far from this Court's teaching on judicial deference. "Courts grant an agency's interpretation of its own regulations considerable legal leeway," *Barnhart*, 535 U.S. at 217; *see also Christensen*, 529 U.S. at 588, and such interpretations are "controlling unless plainly erroneous or inconsistent with the regulation," *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted). Indeed, courts "*must* defer to the [agency's] interpretation unless an alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation." *Thomas Jefferson University*, 512 U.S. at 512 (emphasis added and internal quotation marks omitted).

The pivotal question in this case for the court of appeals was whether the Department of Labor deliberately exercised its statutory authority to define and delimit the concept of "companionship services" when, in 1975, the agency promulgated § 552.109(a). (23a). The Department's statements regarding § 552.109(a) "at the time of the regulation's promulgation" strongly indicate that the Secretary of Labor invoked that authority. *Thomas Jefferson University*, 512 U.S. at 512 (internal quotation marks omitted). But any claimed ambiguity on this point was dispelled by the agency's *amicus* filing in the court of appeals. In that brief, the Department of

Labor described § 552.109(a) as a "legislative rule[ ]" (56a), which was "promulgated in 1975 *in response to* an express delegation of authority by Congress" (62a (emphasis added)). The agency further maintained that "section 552.109(a) serves to 'define and delimit' the terms of the 'companionship services' exemption *under Congress' express delegation of authority*." (66a (emphasis added)). Thus, the Department of Labor confirmed that the Secretary had deliberately invoked the agency's statutory authority in promulgating § 552.109(a). That confirmation should have been conclusive. It "reflect[s] the agency's fair and considered judgment on the matter in question," and therefore warranted controlling deference. *Auer*, 519 U.S. at 462.

Accordingly, by undertaking a *de novo* examination of a regulatory scheme that was implemented *thirty* years ago through notice-and-comment rulemaking, the Second Circuit fundamentally misapplied *Chevron*'s directive as well as other bedrock principles of administrative law.[12] Given the serious and adverse consequences of the Second Circuit's ruling, this Court should grant the petition in order to ensure that *Mead*'s clarification regarding the appropriate application of *Chevron* deference is

---

[12] "[T]his Court will normally accord particular deference to an agency interpretation of longstanding duration," *Barnhart*, 535 U.S. at 220 (internal quotation marks omitted), especially when the challenged regulation is a contemporaneous construction of a statute by the agency charged with its administration, *see Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933). Moreover, where, as here, Congress has amended the relevant statutory provision numerous times without expressing disapproval for an agency interpretation, the "conclusion is plain"—Congress "did not regard [the agency's action] as inconsistent with the [statute]." *Boesche v. Udall*, 373 U.S. 472, 483 (1963); *see also Barnhart*, 535 U.S. at 220; *Edelman*, 535 U.S. at 118. The court of appeals gave short-shrift to these important rules of administrative law.

not actually used by lower courts to undermine the authority of agencies to administer the law.

The Second Circuit's application of *Skidmore* is equally troubling, and presents a serious threat to the enforceability of many agency rules, regulations, and interpretations that merit some level of judicial deference. Under *Skidmore*, an informal agency regulation may command deference "proportional to its power to persuade," and thus may "claim the merit of its . . . thoroughness, logic, and expertness, its fit with prior interpretations, *and any other sources of weight*." *Mead*, 533 U.S. at 235 (internal quotation marks omitted); *see also Skidmore*, 323 U.S. at 140 (validity of challenged regulation "will depend upon . . . *all* those factors which give it the power to persuade" (emphasis added)). As the Sixth Circuit recently described this standard, "*Skidmore* permits courts to give consideration to an agency's expertise and ability to persuade, not its ability to speak with legal effect. . . . *Skidmore* thus permits an agency to *earn* the weight given to it by the courts." *Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 643 (6th Cir. 2004) (emphasis in original).

However, an agency's ability to "earn" persuasive force for a regulation may turn upon a factual presentation. Thus, *Mead* recognizes that the proper analysis under this standard is not limited to abstract argumentation and claimed expertise, but also includes consideration of "*any* other sources of weight." 533 U.S. at 235 (emphasis added). A *Skidmore* analysis may therefore require proceedings beyond the pleading stage, including evidentiary submissions. *See, e.g., Brown v. United States*, 327 F.3d 1198, 1206 (D.C. Cir. 2003) (considering "affidavits of various Treasury officials" in upholding under *Skidmore* agency's methodology in calculating locality pay increases). That depth of consideration was absent here.

The Second Circuit acknowledged that, "[u]nlike most, if not all, of the other courts that have considered the issues in this appeal," it reviewed Respondent's case "before summary judgment and, thus, without any factual development." (4a (footnote omitted)). Given that the court struck out on its own to undertake a *Skidmore* analysis, this was a serious misstep. By invalidating § 552.109(a) under *Skidmore* without a factual record, the court of appeals denied Petitioners the ability to identify and present important "sources of weight" from which the regulation could derive substantial support.

For example, when the Department of Labor withdrew the 2001 NPR in 2002, the agency reported that "numerous commenters on the proposed rule, including multiple government agencies . . . , seriously called into question the Department of Labor's conclusion that there would be little economic impact" from changing § 552.109(a). 67 Fed. Reg. 16,668 (April 8, 2002). That rulemaking record, which prompted the agency "to withdraw the proposed rule and terminate [its] rulemaking action," could very well bolster the persuasiveness of the regulation as it stands now. *Id.* And yet, the court of appeals had none of that information to consider before invalidating § 552.109(a). Similarly, the court of appeals had no evidence to consider from private and governmental members of the home health care community, who certainly could "bring the benefit of specialized experience to bear on the subtle questions in this case" regarding the important economic and quality control functions served by § 552.109(a). *Mead*, 533 U.S. at 235.

When the stakes of invalidating a long-standing regulation are as high as they are here, and the consequences are as potentially harmful, courts should make every effort to review "all those factors which give [a regulation] the power to persuade." *Skidmore*, 323 U.S. at 140.

The court of appeals disregarded this important rule and acted prematurely. The court's analysis merely preferred its own policy choices over those of the Department of Labor,[13] and ironically faulted the Department of Labor

---

[13] The court of appeals invalidated § 552.109(a) because it is supposedly inconsistent with congressional purpose, inconsistent with other regulations and with the agency's own views over time, and is based upon invalid reasoning. (26a-29a). The court's analysis on each of these points is deeply flawed.

To start, the court's conclusion that it is "implausible, to say the least, that Congress, wishing to expand FLSA coverage would have wanted the [Department of Labor] to eliminate coverage for employees of third party employers who had previously been covered" (27a), overlooks two crucial considerations. First, Congress has amended § 213 of the FLSA seven times since its enactment in 1974 and has never disapproved § 552.109(a). This legislative record is strong evidence that Congress believes that § 552.109(a) is consistent with the statute. *See Boesche*, 373 U.S. at 483. Second, § 213(a)(15)'s legislative history suggests that Congress was trying to balance its desire to extend FLSA coverage to domestic employees against its wish to foster close, consistent and cost-controlled relationships between caregivers and clients. § 552.109(a) is certainly a reasonable accommodation of these competing legislative interests and thus warrants substantial deference. *See United States v. City of Fulton*, 475 U.S. 657, 667-68 (1986); *United States v. Shimer*, 367 U.S. 374, 383 (1961).

Similarly, the court's observation that § 552.109(a) is "jarringly inconsistent" with § 552.3 is traceably misguided. (27a). § 552.109(a) does not directly implicate § 552.3's definition of "domestic service employment;" it expressly corresponds to § 552.6's definition of "companionship services." *See* 29 C.F.R. § 552.109(a) (referencing § 552.6). Together, §§ 552.6 and 552.109(a) thus regulate the application of minimum wage and overtime pay requirements to "companionship services," which is a statutory subset of "domestic service employment." *See* 29 U.S.C. § 213(a)(15). This subset exemption for "companionship services" carved out by § 552.109(a) easily coexists with § 552.3's narrower exemption for the general category of "domestic service employment." Nor, as the Second Circuit suggests, does any inconsistency arise from the fact that the Department of Labor has previously considered changing § 552.109(a). (28a). § 552.109(a) has

for having failed to "adequately explain[ ]" the rationale underlying § 552.109(a). (28a). Of course, the agency did not participate in the district court proceedings and no party ever had the opportunity to develop a factual record.

Not surprisingly, neither *Skidmore* nor *Mead* condones this approach, as it obviously undermines the presumption that informal agency interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore*, 323 U.S. at 140. In consequence, this Court should grant the petition in order to instruct lower courts on the importance of giving agencies or other interested parties a full and fair opportunity "to *earn* the weight" of a challenged regulation. *Air Brake Sys.*, 357 F.3d at 643 (emphasis in original).

---

remained unchanged for 30 years, and agencies should feel free to consider revisions from time to time as good administration may require. *Chevron*, 467 U.S. at 863-64 ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.")

Finally, the Second Circuit's criticism of the agency's 1974 construction of § 213(a)(15) is fundamentally confused. Based upon the agency's general *regulatory* definition of "domestic service employees"—which includes only domestic service employees who are employed directly by homeowners—the court found that the extension of the *statutory* exemption from minimum wage and overtime pay requirements to employees of third party employers was contrary to the "plain language" of the statute. (29a). But the statute empowers the Department of Labor to exempt from these requirements "*any* employee employed in domestic service employment *to provide companionship services*." 27 U.S.C. § 213(a)(15) (emphasis added). Hence, § 552.109(a)'s exemption of home health care workers employed by third parties fits neatly into the statutory exemption for "*any* employee" hired "to "provide companionship services." *Id.* (emphasis added). The court of appeals' construction of § 213(a)(15) thus inexplicably ignores the statute's "companionship" qualifier.

CONCLUSION

The petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit should be granted.

Dated: New York, New York
March 29, 2005

Respectfully submitted,

DANIEL S. ALTER, ESQ.*
C/O ALTER & ALTER
300 East 42nd Street, 10th Floor
New York, New York 10017
(212) 867-7777

Counsel for Petitioners

*Counsel of Record

APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2003

(Argued March 4, 2004 Decided July 22, 2004)

Docket No. 03-7666

EVELYN COKE,

Plaintiff-Appellant,

—v.—

LONG ISLAND CARE AT HOME, LTD., and MARYANN OSBORNE,

Defendants-Appellees.

Before:

WALKER, *Chief Judge*, KATZMANN, *Circuit Judge*, and GLEESON, *District Judge*.*

Appeal from the grant of defendants' motion for judgment on the pleadings by the United States District Court for the Eastern District of New York (Thomas C. Platt, *District Judge*), finding two regulations promul-

---

* The Honorable John Gleeson, of the United States District Court for the Eastern District of New York, sitting by designation.

gated by the Department of Labor defining and interpreting the "companionship services" exemption in the Fair Labor Standards Act, 29 U.S.C.§ 213(a)(15), to be enforceable, thereby precluding plaintiff's claims for minimum wage and overtime compensation under the Act.

AFFIRMED in part; VACATED in part; and REMANDED.

HAROLD CRAIG BECKER, Service Employees International Union, AFL-CIO, Chicago, IL (Michael Shen, Constantine P. Kokkoris, New York, NY, *on the brief*), *for Plaintiff-Appellant*.

Arnold S. Klein, Meltzer, Lippe & Goldstein, LLP, Mineola, NY (on submission), *for Defendants-Appellees*.

FORD NEWMAN, Senior Attorney, United States Department of Labor (Howard M. Radzely, Acting Solicitor of Labor, Steven J. Mandel, Associate Solicitor, Paul L. Frieden, Counsel for Appellate Litigation, *on the brief*), Washington, D.C., *for Amicus Curiae United States Secretary of Labor*.

JOHN M. WALKER, JR., *Chief Judge*:

At issue in this appeal is the enforceability of two regulations promulgated by the Department of Labor ("DOL") that define and interpret the "companionship services" exemption in the Fair Labor Standards Act

("FLSA" or "the Act"), 29 U.S.C.§ 213(a)(15). The Act generally requires minimum wage and overtime compensation; the "companionship services" exemption relieves employers from paying such compensation to those employees who work in domestic service as babysitters and companions to the elderly and infirm. The regulations at issue implement the exemption with respect to companions.

The first regulation we consider is a regulation that defines the exemption. It includes within the exemption (1) those who perform household work related to the care of the elderly or infirm and (2) those who also perform housework incidental to their "companionship services" as long as the housework accounts for less than twenty percent of the weekly hours worked. *See* 29 C.F.R. § 552.6. The second regulation we consider applies the exemption to "[e]mployees who are engaged in providing companionship services, as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services." *See* 29 C.F.R. § 552.109(a). The district court found both of these regulations to be entitled to the highest form of deference available to agency regulations and, accordingly, found them legally enforceable. *See Coke v. Long Island Care at Home, Ltd.*, 267 F. Supp. 2d 332 (E.D.N.Y. 2003).

We affirm the enforceability of the first regulation, § 552.6, according it the highest level of deference available to agencies pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But we conclude that the second regulation, § 552.109(a), is neither entitled to *Chevron* deference nor enforceable; we find it to be entitled only to the more limited level of deference announced in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and reaffirmed in *United States v. Mead Corp.*, 533 U.S. 218 (2001).

Because the second regulation is unpersuasive in the context of the entire statutory and regulatory scheme, it fails *Skidmore*'s test and cannot be enforced. Accordingly, we AFFIRM in part, VACATE in part, and REMAND for further proceedings.

FACTUAL BACKGROUND

Plaintiff-appellant Evelyn Coke appeals from the judgment on the pleadings, entered pursuant to Federal Rule of Civil Procedure 12(c), in favor of defendants-appellees Long Island Care at Home, Ltd. and owner Maryann Osborne, by the United States District Court for the Eastern District of New York (Thomas C. Platt, *District Judge*). *See Coke*, 267 F. Supp. 2d at 332-41. The Secretary of Labor submitted an amicus brief arguing on behalf of defendants-appellees that the district court's ruling should be affirmed.

Unlike most, if not all, of the other courts that have considered the issues in this appeal,[2] we review Coke's case before the summary judgment stage and, thus, without any factual development. All we know is that Coke filed this action under the FLSA, alleging that she was employed as a "home healthcare attendant" by defendants, who did not pay her minimum wage or overtime compensation. While such compensation is generally

---

[2] We collect the full citations to such cases here in chronological order for ease of reference: *McCune v. Or. Senior Servs. Div.*, 894 F.2d 1107 (9th Cir. 1990); *Cox v. Acme Health Servs., Inc.*, 55 F.3d 1304 (7th Cir. 1995); *Salyer v. Ohio Bureau of Workers' Comp.*, 83 F.3d 784 (6th Cir. 1996); *Terwilliger v. Home of Hope, Inc.*, 21 F. Supp. 2d 1294 (N.D. Okla. 1998); *Johnston v. Volunteers of Am., Inc.*, 213 F.3d 559 (10th Cir. 2000); *Madison v. Res. for Human Dev., Inc.*, 233 F.3d 175 (3d Cir. 2000); *Harris v. Dorothy L. Sims Registry*, No. 00 C 3028, 2001 U.S. Dist. LEXIS 23263, 2001 WL 78448 (N.D. Ill. Jan. 29, 2001); *Welding v. Bios Corp.*, 353 F.3d 1214 (10th Cir. 2004).

required under the FLSA, Coke acknowledges that the "companionship services" exemption to the FLSA, as defined and interpreted by the DOL regulations, applies to her employment and that if the regulations at issue are enforceable, she cannot prevail. Her arguments are purely legal.

Coke contends that the two regulations defining and interpreting "companionship services" are unreasonable and impermissible in light of the statute's clear language and statutory purpose. Coke candidly calls her action a test case, "challenging the regulation[s] on [their] face." She does not allege that the regulations are being improperly applied to a subclass of employees but, rather, that they contravene legislative will and are therefore unenforceable. After the district court accorded the two regulations *Chevron* deference and found them to be permissible under the statute, it granted defendants' motion for judgment on the pleadings. This appeal followed.

DISCUSSION

I. *Standards of Review*

We review the decision of the district court *de novo* both because the judgment below was entered on the pleadings on a matter of statutory construction, *Levy v. Southbrook Int'l Invs., Ltd.*, 263 F.3d 10, 14 (2d Cir. 2001); *Davidson v. Flynn*, 32 F.3d 27, 29 (2d Cir. 1994), and, more specifically, because the decision as to whether an FLSA exemption may be applied to a class of claimants is a question of law, *Freeman v. NBC*, 80 F.3d 78, 82 (2d Cir. 1996). Moreover, the question of the appropriate level of deference to accord agency regulations is one purely of law, subject to *de novo* review. *See Ossen v. Dep't of Soc. Servs. (In re Charter Oak*

Assocs.), 361 F.3d 760, 764 (2d Cir. 2004) (pure questions of law are reviewed *de novo*). *See generally* 5 U.S.C. § 706 ("[T]he reviewing court shall decide all relevant questions of lawL"). At this stage of the litigation, it is conceded by both parties that there are no disputed issues of material fact.

Our review in the FLSA context is guided by a few specialized principles. Because the FLSA is a remedial act, its exemptions are to be narrowly construed. *See Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959). *And an employer bears the burden of proving that its employees fall within an exemption in the FLSA. See Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974); *Arnold*, 361 U.S. at 392; *Donovan v. Carls Drug.*, 703 F.2d 650, 652 (2d Cir. 1983). In sum, "[t]o extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). Bearing these guiding principles in mind, we undertake our *de novo* review of the district court's decision upholding the two regulations at issue here.

II. *Statutory Scheme*

The FLSA, enacted by Congress in 1938, requires that most workers receive minimum wage and overtime compensation for hours worked in excess of forty per week. *See generally* 29 U.S.C. § 201 *et seq.* In 1974, Congress amended the FLSA to broaden its coverage to a new set of workers, previously unprotected by the Act: employees performing "domestic services." While the statute itself did not define "domestic service employment," the Senate Committee Report confirms the commonly understood meaning of the term to include those employed within the

home as cooks, butlers, valets, maids, housekeepers, governesses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, chauffeurs, and the like. *See* S. Rep. No. 93-690, at 20 (1974); *see also* H.R. Rep. No. 93-913, at 35-36 (1974). However, while extending FLSA protections to employees in domestic service, Congress carved out an exemption for employees engaged in "babysitting services" and "companionship services." The exemption withholds FLSA benefits from:

> any employee employed on a casual basis in domestic service employment to provide baby-sitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary [of Labor]) . . . .

29 U.S.C.§ 213(a)(15). In order to more clearly delineate those who are subject to the exemption, the Secretary of Labor, soon after the adoption of the 1974 amendments, promulgated a series of regulations, including the two that Coke challenges here.

III. *Regulatory Scheme*

The first regulation Coke challenges was promulgated in exercise of the authority delegated by§ 213(a)(15) to define "companionship services." It defines "companionship services" as

> those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making,

> washing of clothes, and other similar services. They may also include the performance of general household work: *Provided, however*, [t]hat such work is incidental, *i.e.*, does not exceed 20 percent of the total weekly hours worked.

29 C.F.R. § 552.6.

A related regulation (not challenged here), also promulgated in clear exercise of the authority delegated by § 213(a)(15), adopts the House Committee Report's definition of "domestic service employment." That regulation states that domestic service "refers to services of a household nature performed by an employee in or about a private home . . . *of the person by whom he or she is employed*." 29 C.F.R. § 552.3 (emphasis added); *cf.* H.R. Rep. No. 93-913, at 35 (defining "domestic service employment" to be "services of a household nature performed by an employee in or about a private home of the person by whom he or she is employed"); *see also* S. Rep. No. 93-690, at 20 (stating that the House's construction of "domestic service employment" to exclude third party employment is "generally accepted").

The second regulation Coke challenges, 29 C.F.R. § 552.109(a), also promulgated soon after the 1974 amendments, expressly extends the exemption by including employees "who are employed by an employer or agency other than the family or household using their services." Section 552.109(a) appears under the "Subpart B" heading, "Interpretations," as opposed to the "Subpart A" heading, "General Regulations," under which § 552.3 and § 552.6 are listed. This regulation exempted employees who the DOL concedes were not exempt prior to the 1974 amendments. *See* Employment of Domestic Service Employees, 39 Fed. Reg. 35, 382, 35,385 (proposed Oct. 1, 1974) (finding that "[e]mployees who are engaged in providing . . . companionship services and

who are employed by an employer other than the families or households using such services" were "subject to the [FLSA] prior to the 1974 Amendments"). Prior to the promulgation of § 552.109(a), the DOL put out a different proposed rule for notice and comment: one that specifically declined to apply the "companionship services" exemption to employees of third party employers. *See id.* Following notice and comment on that proposed regulation, the agency reversed its position and offered the following explanation: "On further consideration, [the Secretary of Labor] ha[s] concluded that these exemptions can be available to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services." Application of the Fair Labor Standards Act to Domestic Service, 40 Fed. Reg. 7404, 7405 (Feb. 20, 1975) (codified at 29 C.F.R. pts. 516, 552). The statement accompanying the regulation did not explain how bringing these previously covered employees of third party employers within the exemption furthered the congressional purpose of expanding, and not narrowing, FLSA coverage from what it had been prior to 1974. The DOL did not extend the exemption to apply to those employees employed by third parties that provide "babysitting services." *See* 29 C.F.R. § 552.109(b).

The DOL has enforced the two regulations at issue since their promulgation in 1974 and Congress has not disturbed the details of the scheme recounted here in the nearly thirty years they have been in force. In early 2001, however, the agency proposed amendments to the regulations pertaining to the "companionship services" exemption, which were subsequently abandoned. In proposing the amendments, the DOL stated:

> Due to significant changes in the home care industry over the last 25 years, workers who today provide in-home care to individuals needing assistance

> with activities of daily living are performing types of duties and working in situations that were not envisioned when the companionship services regulations were promulgated. The number of workers providing these services has also greatly increased, and most of these workers are being excluded from the FLSA under the companionship services exemption. The Department has reevaluated the regulations and determined that—as currently written—they exempt types of employees far beyond those whom Congress intended to exempt when it enacted section [2]13(a)(15). Therefore, the Department proposes to amend the regulations to revise the definition of "companionship services," which sets out the duties that a companion must be employed to perform in order to qualify for the exemption, to more closely mirror Congressional intent.

See Application of Fair Labor Standards Act to Domestic Serivce, 66 Fed. Reg. 5481, 5482 (proposed Jan. 19, 2001). The DOL further explained what it understood to have been the congressional intent in 1974:

> [I]t clearly was Congress' intent under the 1974 FLSA Amendments to cover all workers who performed domestic services as a vocation, excluding casual babysitters and providers of companionship services who were not regular bread winners or responsible for their [own] families' support. . . . Personal and home care aides perform a variety of tasks in the home, including household work and assistance with nutrition and cleanliness. Employers have generally treated workers employed as home health aides and personal and home care aides as exempt companions, based upon the Department's current regulations. . . . As a result, the

> Department believes it is necessary to amend the regulations to focus them on fellowship and protection duties that Congress originally intended the companion exemption to cover.

Id. at 5483. The 2001 proposed amendments to the regulations would have extended FLSA protection to employees who are hired by "someone other than a member of the family in whose home he or she works." *Id.* at 5482. The DOL expressly acknowledged that there exists an internal inconsistency between § 552.109(a) and § 552.3 and that § 552.3 is more consistent with the congressional purpose as it existed in 1974. *Id.* at 5485. Nonetheless, without further addressing the inconsistency, the DOL withdrew the proposed amendments in April 2002 because "numerous comment[s] on the proposed rule, including [comments offered by] multiple government agencies . . . seriously called into question the Department's conclusion that there would be little economic impact." Application of the Fair Labor Standards Act to Domestic Service, 67 Fed. Reg. 16,668 (Apr. 8, 2002). Upon withdrawing the proposed amendments, the DOL did not question or otherwise comment upon its 2001 conclusion about what congressional intent had been in 1974.

IV. *The Enforceability of 29 C.F.R. § 552.6*

A. Degree of deference to accord to the DOL

The district court accorded *Chevron* deference to § 552.6's definition of "companionship services." Neither party in this case objects to this because the statute directed the DOL to promulgate legislative regulations to define the term "companionship services" as it appears in 29 U.S.C. § 213(a)(15), and the regulations are plainly an exercise of that authority. *See Mead*, 533

U.S. at 226-27 (clarifying that *Chevron* deference is appropriate when a statute clearly delegates authority to an agency and the agency acts purporting to exercise that authority); *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 226 (2d Cir. 2002); 29 C.F.R. § 552.2(c) (expressly stating that "[t]he definitions required by § [2]13(a)(15) are contained in § 552.3, § 552.4, § 552.5 and § 552.6"). Accordingly, § 552.6 is binding on the courts unless procedurally defective, "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. Here, Coke argues that § 552.6 is unenforceable as being manifestly contrary to the statute.

In applying *Chevron* deference, we follow a two-step analysis: "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. When the terms of a statute are unambiguous, the judicial inquiry is complete. However, if there is ambiguity in the statute, we proceed to step two and inquire whether the agency's legislative regulation is a reasonable and permissible construction of the statute. *Id.* at 843-44. "If the agency's reading fills a gap or defines a term in a reasonable way in light of the Legislature's design, we give that reading controlling weight, even if it is not the answer the court would have reached if the question initially had arisen in a judicial proceeding." *Regions Hosp. v. Shalala*, 522 U.S. 448, 457 (1998) (internal quotation marks omitted) (citing *Chevron*, 467 U.S. at 843 n.11). We are also mindful that "a long-standing, contemporaneous construction of a statute by the administering agenc[y] is entitled to great weight." *Leary v. United States*, 395 U.S. 6, 25 (1969) (internal quotation marks and citations omitted).

B. Application of *Chevron*

Coke argues that we needn't arrive at step two of the *Chevron* inquiry and that we should find that the statute plainly and on its face prohibits the agency's definition of "companionship services." In particular, she contends that the regulation's inclusion within the definition of both housework *related to* the care of the elderly or infirm and housework *incidental to* that care are violative of the statute's command to fashion an exemption only for "companionship services." Coke suggests that the large amount of incidental housework permitted by the current regulation (twenty percent of the work) is an abuse of the delegation under the statute. Indeed, she argues, under a particular reading of the regulation's second sentence (the one that allows work "related to" the care of the elderly or infirm), "household work" would be exempt even if no companionship were provided at all: "Under the regulation, an elderly person unable to care for him or herself could hire a full-time companion *and* a full-time cook, pay the cook less than the minimum wage, and successfully assert that cooking is a companionship service . . . ." Appellant's Br. at 16. Thus, because Congress clearly indicated that "companionship services" were meant to be a subset of domestic services, and the regulation can be read to exempt pure domestic service without companionship, Coke argues that the regulation was drawn too broadly on its face. Since Congress wanted to make sure domestic service employees got FLSA protection, she argues that § 552.6's extension of the exemption to "meal preparation, bed making, [and] washing of clothes" places too many domestic service employees within the exemption, a result that Congress could not have intended. The district court properly rejected these arguments.

The statute plainly gives the DOL authority to define "companionship services," a vague term with no obvious plain meaning; and the DOL did so very soon after the passage of the amendments to the FLSA. On the face of the statute, we discern no unambiguous congressional intent to keep all "incidental" services and domestic services "related to" the care of the elderly and infirm outside the exemption, especially when such services would naturally follow from or be part of a reasonable job description of a companion to the elderly or infirm.

Although the Supreme Court has issued mixed messages as to whether a court may consider legislative history at this stage of the analysis (step one of *Chevron*),[3] that history plainly presupposes that some incidental or other related housework would accompany "companionship." For example, Senator Quentin Burdick wanted to extend FLSA coverage for "professional domestic[s]" but was concerned about the potential burden on household employers where "people who might have an aged father, an aged mother, an infirm father, an infirm mother, and a neighbor comes in and sits with them. This, of course, entails some work, such as perhaps mak-

---

[3] *Compare FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 137 (2000) (effectively considering legislative history at step one of *Chevron* analysis), *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697-99 (1991) (same), *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 649-50 (1990) (same), *and Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 233-41 (1986) (same), *with K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 293 n.4 (1988) (opinion of Kennedy, J.) (noting in the first step of a *Chevron* inquiry that "any reference to legislative history [ ] is in the first instance irrelevant"), *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999) (finding statutory text clear enough to ignore any arguments from legislative history), *and Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 417 (1992) (finding only statutory text to be relevant for first-step *Chevron* analysis).

ing lunch . . . . This would be incidental to the main purpose of the employment." 119 Cong. Rec. 24,773, 24,801 (1973). Senator Harrison Williams explained the purpose of the "companionship services" exemption through an analogy to the "babysitting" exemption:

> We use the situation in which people are in a household not to do household work but are there, first, as babysitters. I think we all have the full meaning in mind of what a babysitter is there for—to watch the youngsters.
>
> "Companion," as we mean it, is in the same role — to be there and to watch an older person, in a sense.
>
> . . . .
>
> [Household work] which is purely incidental would not change the category of the person being there in the household.

Id. Without attaching primacy to using legislative history at step one, it seems to us more likely than not that Congress understood that when employees are in the home "first" to be companions or babysitters, they may engage in "incidental" housework without falling outside the exemption. The DOL's regulatory choice of the twenty percent allowance for incidental work is not clearly contravened by either the text of the statute or the intent of Congress to the extent it is discernable.

More troubling is the second sentence of the regulation, which is not delimited by the twenty percent rule. It does seem to allow, as Coke argues, virtually unlimited household work as long as it is "related to the care of the aged or infirm person." The DOL, however, in its amicus brief explains:

> Under section 552.6, an employee must "provide fellowship, care, and protection" for a person unable

> to care for himself in order to meet the requirements of the "companionship services" exemption. While the regulation allows for the performance of some household work, it must be either "related to" or "incidental" to the "care of the aged or infirm person. *See* 29 C.F.R. § 552.6." Thus, contrary to [Coke's] suggestion, an employee hired only to perform household work or as a "full-time cook" would not meet the requirements of the regulation. An employee who has not been hired primarily to provide "fellowship, care, and protection" will not be considered exempt under the Act or the regulations.

Br. of Amicus Curiae DOL at 19 (citations omitted). The DOL's explanation is adequate. At best, the regulation is ambiguous on the question of whether the first sentence of the regulation must be satisfied—that an employee must first provide "fellowship, care, and protection"—before proceeding to the inquiry about whether to exempt the "related" household work.

We note, however, that we have no occasion to limit the enforcement of § 552.6 to the DOL's litigation position here because Coke concedes that her challenge is to the regulation "on its face," that is, in all its applications. Coke has specifically refused to challenge the regulation "as applied" to any particular class of employees. We do not rule out the possibility of an application that would contravene the plain statutory mandate, but because there are many applications of the regulation that are consistent with the statute, we cannot declare it invalid on its face. *See generally Reno v. Flores*, 507 U.S. 292, 301 (1993) (extending the no-set-of-circumstances test for facial constitutional challenges to statutes under *United States v. Salerno*, 481 U.S. 739 (1987), to *Chevron* challenges). In any event, Coke presents no facts upon which we could conclude that the

agency has ever applied the regulation in the purportedly impermissible way she envisions.

If we refused to consider the unequivocal legislative history at step one of *Chevron*, the statute is at best ambiguous on the question of whether incidental services and household work related to the care of the individual may accompany the fellowship and companionship focus of the exemption.[4] And step two of *Chevron* requires us to inquire if the DOL's regulation "harmonizes with the language, origins, and purpose of the statute." *Bankers Life & Cas. Co. v. United States*, 142 F.3d 973, 983 (7th Cir. 1998). Consideration of legislative history is generally accepted at this stage of the analysis. *E.g.*, *Toibb v. Radloff*, 501 U.S. 157, 162 (1991); *Bankers Life*, 142 F.3d at 983.

Coke also argues that § 552.6 fails step two of *Chevron*. Coke repeats the arguments she makes in connection with step one and also focuses on Senator Burdick's statement in the legislative history that sums up the "companionship services" exemption as one targeted for "elder sitter[s]." *See* 119 Cong. Rec. at 24,801. Coke intimates that a sitter must only sit, without lifting a hand to help the elderly or infirm with incidental housework. But, again, we agree with the district court that

---

[4] The DOL's 2001 statements do not prove that § 552.6 is unenforceable. First, the DOL's contemporaneous assessment of congressional intent is more probative: Apparently, the DOL thought § 552.6 represented congressional intent in 1974 and the enacting Congress expressed no discontent. Second, the DOL's interpretation of congressional intent, whether in 2001 or 1974, could never be dispositive for our *Chevron* inquiry. Of course, the entire purpose of the *Chevron* inquiry is to determine congressional intent quite apart from what the agency interprets that intent to be. Only if we conclude that the enacting Congress's intent is ambiguous do we defer to reasonable interpretations of the gap left by the ambiguity.

§ 552.6 survives the *Chevron* inquiry. The Senate Report, cited by Coke, makes clear that some incidental household work and housework related to the care of the elderly or infirm does not contravene the purpose of the exemption. *See* 119 Cong. Rec. at 24,801 (1973). The idea that a sitter merely sits is belied by Senator Burdick's analogy: Sitters provide care, and care entails other incidental tasks such as food preparation, feeding, cleaning up messes, changing diapers, and other services. Accordingly, given the deference afforded the agency under *Chevron*, we are unable to conclude that § 552.6 is arbitrary, capricious, or manifestly contrary to the statute with respect to either (1) the twenty percent allowance for incidental housework in the agency's legislative regulation, or (2) the agency's allowance for household work related to the care of the individual.

Every circuit to have considered the question of the enforceability of § 552.6 has found the regulation enforceable on its face. *See, e.g.*, *Johnston*, 213 F.3d at 565; *Salyer*, 83 F.3d at 787; *McCune*, 894 F.2d at 1110. Only *Harris*, 2001 U.S. Dist. LEXIS 23263, at *17, a district court decision from the Northern District of Illinois, found the regulation too broad. *Harris*, of course, in no way binds us. Moreover, *Harris* was an "as applied" case and its ultimate pronouncement was narrow. While it calls § 552.6 "unreasonably broad" in the text of the opinion, *id.* at *11, it is more circumspect when it announces its final holding: "§ 552.6, as currently drafted, is invalid *to the extent it exempts homemakers from [FLSA] coverage*," *id.* at *17 (emphasis added); only the particular case of the regulation "as applied" to homemakers—as the plaintiffs were in that case—was held to be outside the "companionship services" exemption.

In the case before us, however, because Coke does not tell us anything about what "home healthcare attendants" actually do, it is impossible for us to pass on the question of whether the particular work she did was considered by Congress to be outside the exemption. Consistent with her facial challenge to § 552.6, Coke refused to amend her complaint to be more specific about what she does. For the foregoing reasons, the regulation withstands *Chevron* deference on this challenge. Accordingly, we AFFIRM the district court's ruling with respect to the enforceability of § 552.6.

V. *The Enforceability of 29 C.F.R. § 552.109(a)*

We now turn to Coke's challenge to § 552.109(a), which applies the exemption to "companionship services" rendered by those who are employed by third parties, rather than by the family of the recipient of the services.

A. Degree of deference to accord to the DOL

The threshold question concerning § 552.109(a)'s enforceability is the degree of deference to be afforded the DOL. Coke argues that the district court erred by according *Chevron* deference to the regulations that the DOL itself calls "interpretations." The DOL argues that such deference was appropriate. Although the district court did not directly consider the question, it is purely one of law, which we consider *de novo*. *See Ossen*, 361 F.3d at 764.

In favor of applying *Chevron* deference is *Chevron*'s own broad statement and *Mead*'s endorsement of that statement:

> When Congress has "explicitly left a gap for an agency to fill, there is an express delegation of

> authority to the agency to elucidate a specific provision of the statute by regulation," and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.

Mead, 533 U.S. at 227 (citation omitted) (quoting *Chevron*, 467 U.S. at 843-44). Thus, to the extent that the statute is silent on the definition of a "domestic service employee" and contains no reference to third party employers, such matters might be understood to be appropriately delegated to the DOL. An agency interpretation "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, *and* that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226-27 (emphasis added). The statute, 29 U.S.C.§ 213(a)(15), expressly delegated authority to the DOL to define and delimit the terms "companionship services" and "domestic service employee," and the DOL argues that *Chevron* deference follows accordingly.

Moreover, the regulation at issue is "a long-standing, contemporaneous construction of a statute," and, as such, "entitled to great weight." *Leary*, 395 U.S. at 25 (internal quotation marks omitted). Indeed, Congress has revisited 213 by amending it seven times since 1974, without expressing any disapproval of the DOL regulation at issue, *see* Pub. L. No. 95-151 (1977); Pub. L. No. 96-70 (1979); Pub. L. No. 101-157 (1989); Pub. L. No. 103-329 (1994); Pub. L. No. 104-88 (1995); Pub. L. No. 104-188 (1996); Pub. L. No. 105-78 (1997). Such congressional acquiescence is "persuasive evidence that the [agency] interpretation is the one intended by Congress."

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 846 (1986).[5]

Finally, when an agency action is " 'the fruit[ ] of notice-and-comment rulemaking or formal adjudication,' " courts generally accord the agency *Chevron* deference. *Chao*, 291 F.3d at 227 (quoting *Mead*, 533 U.S. at 230). Here, no one contests that, although the agency calls § 552.109(a) an "interpretation," it was promulgated following notice and comment procedures. However, it is also true (and a cause of concern) that the rule the agency adopted after comments were received was the opposite of the rule proposed in the original notice. There was no separate notice and comment on the rule as ultimately adopted.

All courts that have considered § 552.109(a) have accorded it *Chevron* deference. *See, e.g.*, *Johnston*, 213 F.3d at 561-62; *Terwilliger v. Home of Hope, Inc.*, 21 F. Supp. 2d at 1299 n.2. But Coke is correct that none of these prior cases carefully considered the question before us now: Does *Mead*, which post-dates the cases affording § 552.109(a) *Chevron* deference, require a dif-

---

[5] The argument from congressional acquiescence—affectionately known as the "dog didn't bark canon"—must always be qualified by the observation that evidence of what subsequent Congresses intend pales in comparison to probative evidence about what the enacting Congress intended; even *Schor* did not rely on what it called the "silence" rule. 478 U.S. at 846. *See generally* William N. Eskridge, Jr. et al., *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 1020-21 (3d ed. 2001) (discussing the "dog didn't bark canon"). Furthermore, because Congress, in amending 213, never reenacted the FLSA or the relevant provisions thereof, this is not a case that implicates the "re-enactment rule" delineated in *Lorillard v. Pons*, 434 U.S. 575, 580 (1978), where "Congress is presumed to be aware of an administrative . . . interpretation of a statute and to adopt that interpretation when it reenacts a statute without [relevant] change."

ferent analysis yielding a different result insofar as it holds that some agency regulations should be accorded less than *Chevron* deference?

Coke argues that *Mead* requires us to apply a lesser degree of deference to § 552.109(a) as an "interpretive," rather than a "legislative" regulation. Indeed, "interpretive rules . . . enjoy no *Chevron* status as a class." *Mead*, 533 U.S. at 232.

This circuit, even before the Supreme Court's clarification in *Mead*, contemplated that interpretive regulations should not receive full *Chevron* deference. In *Reich v. New York*, 3 F.3d 581, 587 (2d Cir. 1993), we considered DOL regulations promulgated to define and delimit the administrative exemption in the FLSA at 29 U.S.C.§ 213(a)(1). We held, "In contrast to the controlling authority given the [DOL's] *legislative* rules—i.e., those promulgated pursuant to an express grant of Congressional authority—the respect accorded the [DOL's] *interpretive* regulations depends upon their persuasiveness . . . ." *Id.* We foretold the precise distinction later drawn in *Mead* when that Court distinguished between those regulations that are accorded *Chevron* deference and those that are not. In *Reich v. New York*, the interpretations from which *Chevron* deference was withheld were classified as "interpretations" by the regulations themselves. *See also Freeman*, 80 F.3d at 83-84 (refusing to accord *Chevron* deference to DOL interpretations under the FLSA despite their promulgation with notice and comment procedures); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 699 n.18 (3d Cir. 1994) ("The DOL interpretations do not have the force of law.").

We find § 552.109(a) to be an interpretive rather than a legislative regulation. While the rule "grants rights, imposes obligations, or produces other significant effects on private interests," as legislative regulations do, *White*

v. Shalala, 7 F.3d 296, 303 (2d Cir. 1993) (internal quotation marks omitted), a rule can only be legislative "if the agency intended to use [the legislative power delegated to it by Congress] in promulgating the rule at issue," *American Postal Workers Union, AFL-CIO v. United States Postal Serv.*, 707 F.2d 548, 558 (D.C. Cir. 1983). Here, the DOL did not intend to use the legislative power delegated in§ 213(a)(15) when it promulgated § 552.109(a). This is most apparent from its inclusion of the regulation under "Subpart B-Interpretations" as opposed to "Subpart A-General Regulations." This appearance is supported by substance.

Congress expressly delegated to the DOL authority to define terms in§ 213(a)(15), and the DOL expressly states in 29 C.F.R. § 552.2(c) that "[t]he definitions required by [2]13(a)(15) are contained in § 552.3, § 552.4, § 552.5 and § 552.6." Accordingly, the regulation at issue, § 552.109(a), is effectively conceded by the DOL not to have been promulgated pursuant to Congress's express legislative delegation in§ 213(a)(15). *Mead* holds that administrative implementation of a particular statutory provision does not qualify for *Chevron* deference unless "it appears that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226-27. Thus, § 552.109(a) does not qualify for *Chevron* deference because, by the DOL's own account, it was self-consciously not promulgated in exercise of Congress's delegated authority pursuant to§ 213(a)(15).

The DOL places emphasis on the fact that in 1974 § 552.109(a) was promulgated after notice and comment and, indeed, *Mead* explicitly instructs us to consider whether a rule was the product of notice and comment in assessing whether to accord it *Chevron* deference. *Mead*, 533 U.S. at 230-31. However, "while notice and com-

ment are required for legislative rules, they are by no means prohibited for interpretive rules." *Mejia-Ruiz v. INS*, 51 F.3d 358, 365 (2d Cir. 1995). *Mead* does nothing to undermine this conclusion. *See Mead*, 533 U.S. at 230-31; Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 Admin. L. Rev. 807, 814 (2002) ("I do not think the Court was saying [in *Mead*] . . . that if an agency adopts notice-and-comment or trial-type hearing procedures *on its own authority*, its interpretation is presumptively entitled to *Chevron* deference." (emphasis removed and emphasis added; citations omitted)).

In this case, the agency undertook a notice and comment procedure for an interpretative regulation despite the fact that the procedure was not required. While *Mead* does not offer specific guidance on whether putting a proposed interpretation out for notice and comment has any effect on deference, following the notice and comment procedure, at most, buttresses a claim that the agency gave consideration to what it did; it does not alter the fact that the agency did not act pursuant to legislative authority.

In any event, here we cannot ignore that the notice and comment procedure for § 552.109(a) was at best idiosyncratic and at worst insufficient. The original notice informed the public that employees of third party employers were *not* going to be exempt from the FLSA (consistent with § 552.3), *see* 39 Fed. Reg. 35,385 (proposed Oct. 1, 1974), but the final rule provided exactly the opposite without a detailed explanation, *see* 40 Fed. Reg. 7405 (Feb. 20, 1975). Because we conclude that § 552.109(a) is interpretative, and thus need not have conformed with notice and comment procedures, we have no occasion to decide whether this regulation is invalid under the Administrative Procedure Act, 5

U.S.C. 553(b)(3)(A). *Cf. Nat'l Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986) ("[I]f the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal.") (internal quotation marks omitted). Nevertheless, we decline the DOL's invitation to bootstrap an entitlement to *Chevron* deference for an interpretative regulation from this substandard notice and comment procedure.[6]

While we agree with Coke that § 552.109(a) does not command *Chevron* deference, *Mead* nevertheless requires us to afford the agency some level of deference with the vague prescription to "tailor deference to variety," 533 U.S. at 236. We believe that *Skidmore* deference based upon the regulation's "power to persuade" is the appropriate level of deference to be applied where, as here, "the agency has some special claim to expertise under the statute." Merrill, *supra*, at 812. To the extent that the regulation represents "more specialized experience and broader investigations and information" available to the agency, we will defer to reasonable regulations. *Skidmore*, 323 U.S. at 139-40; *see also Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 136 (1997) (reasonable agency interpretations carry "at least some added persuasive force" where *Chevron* is inap-

---

[6] Merrill finds "interpretive regulations adopted after notice-and-comment procedures" to be within an "area of uncertainty" after *Mead* for lower courts trying to determine whether to apply *Chevron* deference. Merrill, *supra*, at 821. *But see* Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 Geo. Wash. L. Rev. 347, 350 (2003) (treating notice and comment procedures as affording the agency a "safe harbor" entitlement to *Chevron* deference). We needn't choose between Merrill and Vermeule here because even if Vermeule is right, special circumstances surrounding the notice and comment procedures here militate against furnishing the agency with a safe harbor.

plicable). In determining its "power to persuade," we look to § 552.109(a)'s "consisten[cy] with the congressional purpose," *Morton v. Ruiz*, 415 U.S. 199, 237 (1974); its consistency with other regulations, *see Skidmore*, 323 U.S. at 140; the "consistency of the agency's position" over time, *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977); the "thoroughness evident in [the agency's] consideration"; and the "validity of its reasoning," *Skidmore*, 323 U.S. at 140.

B. Application of *Skidmore*

Considering the regulation's persuasiveness under *Skidmore*'s less deferential standard, we agree with Coke that § 552.109(a) is unenforceable. The regulation is inconsistent with Congress's likely purpose in enacting the 1974 amendments; inconsistent with other regulations (which themselves deserve *Chevron* deference); and inconsistent with other agency positions over time. Moreover, the agency does not proffer valid reasoning for § 552.109(a)'s enforceability, evidencing a lack of thorough consideration.

(1) Congressional purpose

When Congress sought to amend the FLSA in 1974, it desired to expand FLSA coverage to "domestic service employees," and to exempt from coverage only those "domestic service employees" engaged in "companionship services." At the time, persons who were employed by a third party were outside the category of "domestic service employees" and were protected by the FLSA before the 1974 amendments. *See Homemakers Home & Health Care Servs., Inc. v. Carden*, 538 F.2d 98 (6th Cir. 1976); 39 Fed. Reg. 35,385 (Oct. 1, 1974) (DOL finding that "[e]mployees who are engaged in providing . . . companionship services and who are employed by an

employer other than the families or households using such services . . . [were] subject to the [FLSA] prior to the 1974 Amendments"); 66 Fed. Reg. 5485 (Jan. 19, 2001). *See generally* Molly Biklen, Note, *Healthcare in the Home: Reexamining the Companionship Services Exemption to the Fair Labor Standards Act*, 35 Colum. Hum. Rts. L. Rev. 113, 117 (2003). It is implausible, to say the least, that Congress, in wishing to expand FLSA coverage, would have wanted the DOL to eliminate coverage for employees of third party employers who had previously been covered.

(2) Consistency with other regulations and through time

Section 552.109(a) is also jarringly inconsistent with other regulations the DOL itself promulgated under the FLSA immediately following the 1974 amendments. In 29 C.F.R. § 552.3, the DOL defined the term "domestic service employment" to refer "to services of a household nature performed by an employee in or about a private home (permanent or temporary) *of the person by whom he or she is employed*." 29 C.F.R. § 552.3 (emphasis added). Unlike § 552.109(a), this regulation was legislative, issued pursuant to§ 213(a)(15) and, thus, entitled to *Chevron* deference. *See* 29 C.F.R. § 552.2(c) ("[t]he definitions required by [213(a)(15)] are contained in [ ]§ 552.3"). Plainly, under § 552.3, employees employed by third parties do not qualify for the exemption. Indeed, § 552.3 tracks the relevant legislative history that the DOL would have reasonably taken as its guidance. *See* H.R. Rep. No. 93-913, at 35 ("the generally accepted meaning of domestic service relates to services of a household nature performed by an employee in or about a private home *of the person by whom he or she is employed*" (emphasis added)). Thus, the stark internal

inconsistency between § 552.109(a) and § 552.3, when coupled with the latter's entitlement to greater deference and its greater consistency with congressional purpose, strongly counsels against enforcement of § 552.109(a).

Moreover, the agency's position with regard to FLSA coverage through time has hardly been a model of consistency. We have recounted above how, in 1974, the agency proposed a regulation that would have afforded FLSA coverage to employees of third party employers only to reverse itself with the promulgation of § 552.109(a). In 2001, the DOL again proposed that employees of third party employers get FLSA coverage (contrary to the view it endorses in this litigation), only to withdraw the proposal shortly thereafter based on economic considerations that have no bearing on the more relevant question of what Congress intended in 1974.

(3) Validity of the DOL's reasoning

Finally, the DOL's inadequate reasoning in support of the regulation is matched by its failure to exhibit thoroughness in its consideration. Two omissions are particularly notable. First, the DOL offered virtually no explanation for the direct inconsistency between § 552.109(a) and § 552.3. Second, the DOL has not adequately explained—either in the Federal Register or in its submissions to this court —what accounted for the about-face after putting the regulations out for notice and comment in 1974, resulting in third party employers, for the first time, being entitled to claim the exemption. *Compare* 39 Fed. Reg. 35,385 (proposing a regulation on October 1, 1974 that retained the FLSA coverage of employees of third party employers), *with* 40 Fed. Reg. 7405 (adopting a regulation on Feb. 20, 1975 allowing such employees to be subject to the exemption). While the Federal Register recited that "[o]n further consid-

eration, [the Secretary of Labor] ha[s] concluded that the ['companionship services'] exemption can be available to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services," 40 Fed. Reg. 7404, the DOL ignored the plain language of the statute, which precluded an interpretation that the exemption could apply to "any" employee; on its face, it may apply only to employees in "domestic service employment." 29 U.S.C.§ 213(a)(15); *see also* 29 C.F.R. § 552.3 (defining "domestic service employment" to preclude employees of third party employers).

The agency's reasoning has not improved with time. Acknowledging the internal contradiction between § 552.109(a) and § 552.3 in its brief, the DOL today is reduced to asserting that we should uphold the regulation because other courts have done so. This is hardly an argument. As we have explained, the decisions relied upon by the DOL were all prior to the Supreme Court's *Mead* decision, based on which we hold that *Chevron* deference is inapplicable to § 552.109(a). Thus, no other court has considered § 552.109(a) under the proper *Skidmore* level of deference and carefully analyzed the regulation's "power to persuade" in accordance with the factors appropriate to *Skidmore*'s inquiry.

Accordingly, finding that § 552.109(a) cannot survive *Skidmore* analysis, we decline to enforce it. We hereby VACATE the judgment of the district court upholding it, and REMAND the case for further consideration consistent with this opinion.

CONCLUSION

For all the foregoing reasons, we AFFIRM the district court's ruling that 29 C.F.R. § 552.6 is enforceable on its face; VACATE the district court's ruling that 29 C.F.R. § 552.109(a) is enforceable; and REMAND the case for further proceedings.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshal United States Courthouse, Foley Square, in the City of New York, on the 10th day of January two thousand five.

COKE

—v.—

LONG ISLAND CARE

Filed January 10, 2005
03-7666-cv

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the defendants-appellees Long Island Care, et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in

regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: [ILLEGIBLE]
Motion Staff Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COKE

—v.—

LONG ISLAND CARE AT HOME, LTD.

MOTION INFORMATION STATEMENT

Docket Number(s): 03-7666

Motion for: Stay of the Mandate

Set forth below precise, complete statement of relief sought:

Stay of the mandate for 90 days pending application to the Supreme Court for certiorari review.

MOVING PARTY: Long Island Care at Home Ltd., & Maryann Osborne

☐ Plaintiff ☒ Defendant

☐ Appellant/Petitioner ☒ Appellee/Respondent

MOVING ATTORNEY: Daniel S. Alter, Esq.
[name of attorney, with firm, address, phone number and e-mail]

c/o Alter & Alter
300 East 42nd Street, 10th Floor
New York, New York 10017
(212) 867-7777
danny.alter@verizon.net

OPPOSING PARTY: Evelyn Coke

OPPOSING ATTORNEY [Name]: Harold Craig Becker, Esq.
[name of attorney, with firm, address, phone number and e-mail]

(lead counsel)
Services Employees International Union
25 East Washington, Suite 1400
Chicago, IL 60602

Court-Judge/Agency appealed from: Hon. Thomas A. Platt, Eastern District of New York

Please check appropriate boxes:

Has **consent** of opposing counsel:

A. been sought? ☐ Yes ☒ No

B. been obtained? ☐ Yes ☒ No

Is **oral argument** requested? ☐ Yes ☒ No
(requests for oral argument will not necessarily be granted)

Has **argument** date of appeal been **set?** ☐ Yes ☐ No
If yes, enter date N/A

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made **below**? ☐ Yes ☐ No
N/A

Has this relief been previously sought in this Court? ☐ Yes ☒ No

Requested return date and explanation of emergency:

Signature of Moving Attorney:

DANIEL S. ALTER Date: January 17, 2005

Has **service** been effected? ☐ Yes ☐ No

ORDER

Before:

Hon. John M. Walker, Jr., *Chief Judge*,
Hon. Robert A. Katzmann, *Circuit Judges*,
Hon. John Gleeson, *District Judge**

IT IS HEREBY ORDERED that the motion by appellee to stay mandate pending application to the Supreme Court for certiorari review is GRANTED.

March 22, 2005
Date

FOR THE COURT:

ROSEANN B. MACKECHNIE, Clerk
by

TRACY W. YOUNG
Tracy W. Young
Motions Staff Attorney

---

* The Honorable John Gleeson of the United States District Court for the Eastern District of New York, sitting by designation.

Appendix B

UNITED STATES DISTRICT COURT
E.D. New York

No. 02-CV-2010(TCP)(ARL)
May 23, 2003

EVELYN COKE, individually and on behalf of others similarly situated,

Plaintiff,

—v.—

LONG ISLAND CARE AT HOME, LTD. and Maryann Osborne,

Defendants.

Leon Greenberg, New York City, for Evelyn Coke, individually and on behalf of others similarly situated, Plaintiff.

Arnold S. Klein, Meltzer, Lippe & Goldstein, LLP, Mineola, NY, for Long Island Care at Home, Ltd., Maryann Osborne, Defendants.

MEMORANDUM AND ORDER

Platt, District Judge.

Defendants Long Island Care At Home, Ltd. ("LIC") and Maryann Osborne ("Osborne")(collectively "Defendants") move for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

Plaintiff Evelyn Coke ("Coke" or "Plaintiff") opposes the motion and also moves for the circulation of a Notice of Pendency and a Consent to Joinder to similarly situated persons pursuant to 29 U.S.C. § 216(b). This Court heard oral arguments on April 2, 2003.

At issue is whether certain regulations promulgated by the Department of Labor ("DOL") pursuant to the Federal Fair Labor Standards Act, 29 U.S.C. § 201 *et. seq.* (the "FLSA") are legally enforceable. At oral argument Plaintiff's counsel clarified that Plaintiff could not meet the requirements of the relevant regulations as written and that the purpose of this action was to determine the validity of such regulations.[1] (Tr. at 2-5.) As set forth below, because the Court finds that the DOL's regulations are proper Defendants' Motion is GRANTED.

BACKGROUND

A. Factual Background

Plaintiff is a resident of the State of New York, County of Queens, and a former employee of Defendants. LIC is a corporation formed pursuant to the laws of New York State. Osborne is the owner and sole shareholder, as well as a director and officer of LIC.

The pleadings provide little factual background.[2] According to the Complaint, Plaintiff has been employed by Defendant since 1997 and that "her occupations include, but are not limited to, work as a home health-

---

[1] References to the transcript of the April 2, 2003 are cited as Tr. at ___.

[2] While the Plaintiff has provided more details of her employment in an affidavit, the Court may not consider such statements when deciding a Rule 12(c) motion.

care attendant." (Compl. at 10.) Plaintiff contends that despite working more than 40 hours a week she never received overtime payments and that her hourly wage was less the minimum wage outlined in the FLSA.

B. Plaintiff's Claims

Plaintiff has asserted two claims in her Complaint. The First Claim is brought under the FLSA on behalf of Plaintiff and any other persons who consent in writing to join this action pursuant to 29 U.S.C. § 216(b). Plaintiff contends that she was entitled to, but was not paid, minimum wages and an overtime hourly wage of time and one-half for all hours worked in excess of forty hours per week. Plaintiff's Second Claim is brought under the Labor Law of the State of New York and the New York Minimum Wage Act ("NYMWA"), on behalf of Plaintiff and all persons similarly situated. The nature of the claims are identical to those under the First Claim. As relief, Plaintiff requests a judgement for unpaid overtime wages and minimum wages, liquidated damages, attorney's fees, interest and costs as provided for by the FLSA.

Defendant has asserted nine affirmative defenses, including that, workers such as Plaintiff are exempt from eligibility for minimum wage and overtime compensation under the FLSA and the FLSA's implementing regulations.

At oral argument, the Court inquired of Plaintiff's counsel whether he could amend the Complaint to sufficiently allege a cause of action under the FLSA and the regulations promulgated thereunder. Counsel indicated that he could not. (Tr. at 2-5.)

DISCUSSION

A. Rule 12(c) Standard

Rule 12(c) provides that,

> [a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Judgement on the pleadings, pursuant to Fed.R.Civ.P. 12(c) is appropriate where material facts are undisputed and a judgment on the merits is possible merely by considering the contents of the pleadings. *See Mennella v. Office of Court Admin.*, 938 F.Supp. 128, 131 (E.D.N.Y.1996) (Spatt, J.) (citing *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 642 (2d Cir.1988)). "In considering a motion for a judgment on the pleadings, the Court must accept as true all of the non-movant's well pleaded factual allegations, and draw all reasonable inferences in favor of the non-movant." *Id.* (citing *Davidson v. Flynn*, 32 F.3d 27, 29 (2d Cir.1994)).

B. The FLSA Generally

The FLSA of 1938 was enacted for the purpose of regulating minimum wages, maximum working hours, and child labor in industries within interstate commerce. While the FLSA sought to protect some of the nation's

lowest paid workers, it did not apply to all employees. Since 1938, Congress has extended the FLSA's coverage to many other low-paying occupations through periodic amendments.

Among these extensions of coverage were the amendments of 1974, in which Congress extended coverage to employees in "domestic service." Through the 1974 amendments Congress intended to "not only raise the wages of these workers but [to] improve the sorry image of household employment." H.R.Rep. No. 913, 93rd Cong., 2nd Sess., *reprinted in,* 1974 U.S.Code Cong. & Admin. News 2811, 28-43. The 1974 amendments made domestic service employees subject to the minimum wage and maximum working hours requirements of the FLSA.

The 1974 amendments Congress do provide for a limited exemption from the FLSA for certain domestic service employees, as set forth in 29 U.S.C. § 213(a)(15) ("Section 213(a)(15)"). Section 213(a)(15) provides, in pertinent part, that the provisions minimum wage and maximum hour requirements of Sections 206 and 207 of the FLSA shall not apply to,

> (15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (***as such terms are defined and delimited in the regulations of the Secretary***). (emphasis added).

Pursuant to this Congressional delegation of authority, the DOL promulgated 29 C.F.R. § 552.6 ("Section 552.6") which defines "companionship services." It states, in pertinent part,

> the term companionship services shall mean those services which provide fellowship, care and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general housework: Provided however, that such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked.

In discussing the policy reasons for the "companionship services" exemption the Ninth Circuit has stated, "[w]e are informed that these critical services reach more elderly or infirm individuals than they otherwise would precisely because the care-providers are exempt from the FLSA". *McCune v. Oregon Senior Services Division,* 894 F.2d 1107, 1110 (1990).

"Domestic service" itself is not defined in the FLSA. However, the legislative history of the 1974 amendments state,

> the generally accepted meaning of domestic service relates to services of a household nature performed by an employee in or about a private home of the person by whom he or she is employed. The domestic service must be performed in a private home which is a fixed place of abode of the individual or family . . . [g]enerally, domestic service in and about a private home includes services performed by persons employed as cooks, butlers, valets, maids, housekeepers, governesses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family

use. H.R.Rep. No.93-913, 93rd Cong., 2d Sess., reprinted in (1974) U.S.Code Cong. & Ad.News 2811, 2845.

The legislative history also "reveals that Congress used the term 'domestic service employment' interchangeably with the terms 'domestic service in households,' 'private household workers,' and 'household employment.' " *Lott v. Rigby,* 746 F.Supp. 1084, 1088 (N.D.Ga.1990) (citing H.R.Rep. No. 913, 93rd Cong., 2nd Sess., *reprinted in,* 1974 U.S.Code Cong. & Admin. News 2811, 2842-2843).

The DOL has incorporated the legislative history into 29 C.F.R. § 552.3 ("Section 552.3") which states that domestic service "refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." 29 C.F.R. § 552.3. Importantly however, through 29 C.F.R. § 552.109(a) ("Section 552.109(a)") the DOL extends the exemption to "[e]mployees who are engaged in providing companionship services, as defined by § 552.6, and ***who are employed by an employer or agency other than the family or household using their services.***" 29 C.F.R. § 552.109(a) (emphasis added.)

C. Validity of Sections 552.6 and 552.109(a)

Plaintiff argues that both of these regulations are inconsistent with Congress's intent of extending coverage of the FLSA to domestic service employees. Specifically, Plaintiff argues that the definition of "companionship services" in Section 552.6 is overbroad and that Section 552.109(a) improperly extends the

exemption to employees who are employed by an agency.[3]

In regards to Section 552.109(a), Plaintiff asserts that prior to the 1974 amendments home healthcare employees employed by certain agencies would have been covered by "enterprise coverage" as set forth in 29 U.S.C. §§ 203(r), 203(s), 206(a), 207(a), which extends FLSA coverage to all employees of businesses that exceed a certain gross revenue. Plaintiff cites *Homemakers Home and Health Care v. Carden,* 538 F.2d 98 (6th Cir.1976) to support her position. In that case the Sixth Circuit upheld a stipulated finding of fact that the plaintiff, who was a home health care services company, was subject to FLSA enterprise coverage. Plaintiff reasons that in enacting the 1974 amendments Congress intended to extend coverage to domestic services employees, and not to remove coverage already provided to employees employed by FLSA "enterprises." (Pl. Suppl. Mem. at 8.)

Nearly all courts, however, have upheld both of these regulations. *See e.g., McCune v. Oregon Senior Services Division,* 894 F.2d 1107 (1990) (upholding Section 552.6); *Salyer v. Ohio Bureau of Workers' Compensation,* 83 F.3d 784 (6th Cir.1996) (same); *Johnston v. Volunteers of America, Inc.,* 213 F.3d 559 (10th Cir.2000) (upholding Section 552.109). One recent district court

---

[3] Subsequent to oral argument, the Court invited the parties to submit additional materials related to the legislative history of the 1974 amendments. Plaintiff's supplemental materials, in part, raised for the first time the issue of whether 552.109 was procedurally invalid due to an alleged failure to comply with the Administrative Procedures Act, 5 U.S.C. § 553. Because this argument was not raised until several weeks after oral argument, does not appear in the Complaint or Plaintiff's initial brief, and was outside the scope of the Court's invitation, this argument was not considered by the Court.

decision is to the contrary. *See Harris v. Dorothy L. Sims Registry,* 2001 WL 78448, 2001 U.S. Dist. LEXIS 23263 (N.D.Ill.2001). The Second Circuit has never expressly ruled on these issues.

The Supreme Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations" has consistently been followed. *Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc.,* 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). If there is "statutory ambiguity and the agency's interpretation is reasonable, its interpretation must receive deference." *Yellow Transp., Inc. v. Michigan,* 537 U.S. 36, 123 S.Ct. 371, 378, 154 L.Ed.2d 377 (2002) (citing *Chevron,* 467 U.S. at 844, 104 S.Ct. 2778). "[L]egislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.*

In deciding whether a regulation is reasonable, the Supreme Court has stated,

> [w]e ask first whether 'the intent of Congress is clear' as to 'the precise question at issue.' If, by 'employing traditional tools of statutory construction,' we determine that Congress' intent is clear, 'that is the end of the matter.' But 'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.' If the agency's reading fills a gap or defines a term in a reasonable way in light of the Legislature's design, we give that reading controlling weight, even if it is not the answer 'the court would have reached if the question initially had arisen in a judicial proceeding.' *Regions Hos-*

pital v. Shalala, 522 U.S. 448, 457, 118 S.Ct. 909, 139 L.Ed.2d 895 (1998) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

Moreover, "a long-standing, contemporaneous construction of a statute by the administering agencies is 'entitled to great weight.' " *Leary v. United States*, 395 U.S. 6, 25, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969) (citations omitted). Where an agency changes its interpretation, "a revised interpretation deserves deference because 'an initial agency interpretation is not instantly carved in stone' and 'the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.' " *Rust v. Sullivan*, 500 U.S. 173, 186, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (citing *Chevron*, 467 U.S. at 862-864, 104 S.Ct. 2778).[4]

Both Sections 552.6 and 552.109(a) were promulgated in 1975, soon after the 1974 amendments and have been in effect for over twenty-eight years and are therefore entitled to great weight. The DOL did propose amendments to both regulations in January 2001, but those pro-

---

[4] In addition, the Supreme Court has held that "[w]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.' " *CFTC v. Schor*, 478 U.S. 833, 846, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974)). Here Congress has amended Section 213 seven times since 1974. *See* Pub.L. 95-151 (1977); Pub.L. 96-70 (1979); Pub.L. 101-157 (1989); Pub.L. 103-329 (1994); Pub.L. 104-88 (1995); Pub.L. 104-188 (1996); Pub.L. 105-78 (1997).

posed amendments were withdrawn in 2001. In proposing to amend Section 552.6, the DOL stated,

> [t]he Department has reevaluated the regulations and determined that—as currently written—they exempt types of employees far beyond those whom Congress intended to exempt when it enacted section 13(a)(15). Therefore, the Department proposes to amend the regulations to revise the definition of 'companionship services,' which sets out the duties that a companion must be employed to perform in order to qualify for the exemption, to more closely mirror Congressional intent. *Federal Register,* Vol. 66, No. 13 (January 19, 2001).

The DOL's proposals emphasized that the proposed amendments were proper due to the significant changes in the home care industry since 1974 and that home care employees are "performing types of duties and working in situations that were not envisioned when the companionship services regulations were promulgated." *Id.* After reviewing the legislative history, the DOL stated that the 1974 amendments were intended "to include all employees whose vocation was domestic service, but to exempt from the coverage babysitters and companions who were not regular bread winners or responsible for their families' support." *Id.*

In proposing to amend Section 552.6, the DOL stated that, "companionship services cannot be so broad as to include someone who essentially is serving as a maid or household worker." *Id.* The DOL then proposed three possible changes of the definition of "companionship services." All three of the proposals increased the emphasis on fellowship as a "critical component of a companion's duties." *Id.*

In proposing to alter Section 552.109(a), the DOL intended to make the exemptions of Section 213(a)(15) applicable "only with respect to the family or household using the worker's services." *Id.* Under the proposal, if an employee was hired by someone other than a member of the family in whose home he or she works, the employee would be covered by FLSA. *Id.* In this proposed amendment, the DOL noted that there was an internal consistency between Section 552.109(a), which allows employees of agencies to be exempt, and Section 552.3, fashioned from the legislative history, which states that domestic service employment must be "in or about" the private home of the employer. *Id.* Moreover, evidently in reference to "enterprise coverage", the DOL stated that since "[a]nyone who prior to 1974 had worked for a covered placement agency, for example, but who was assigned to work in someone's home, would have been covered previously by the FLSA," it was unlikely that Congress would have sought to change the status of employees who were already covered. *Id.*

In April 2002, the DOL withdrew the proposed amendments because "numerous commenters on the proposed rule, including multiple federal agencies . . . seriously called into question the Department's conclusion that there would be little economic impact." *Federal Register,* Vol. 67, No. 67 (April 8, 2002). After reviewing the "rulemaking record as a whole," the DOL terminated the proposal. *Id.*

After the proposed amendments were issued, but before they were withdrawn, one district court did find that the definition of "companionship services" set forth in Section 552.6 was unreasonably broad. In *Harris v. Dorothy L. Sims Registry,* 2001 WL 78448, 2001 U.S. Dist. LEXIS 23263 (N.D.Ill.2001), the court found that although an agency's interpretation of a statute is pre-

sumptively valid, "courts may not follow agency regulations that are inconsistent with congressional intent." *Id.*, 2001 WL 78448, *2, 2001 U.S. Dist. LEXIS 23263 at *8 (citing *Chevron*, 467 U.S. at 845, 104 S.Ct. 2778). In coming to its conclusion, the court relied heavily on the proposed amendments.

Applying the standard set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the *Harris* court first found that Section 213(a)(15) of the FLSA was ambiguous, since there was more than one reasonable interpretation of "companionship services." The plaintiffs in *Harris* argued that the term "referred to employees hired primarily to act as a companion for the elderly." *Harris*, 2001 WL 78448, *3, 2001 U.S. Dist. LEXIS 23263 at *9-*10. Defendants contended that the term meant "being with someone to help them with their extreme needs." *Id.*

After finding Section 213(a)(15) ambiguous, the *Harris* court then considered whether Section 552.6 was consistent with the language, origins and purpose of the statute. In this stage of the analysis, the court first considered the legislative history, from which it found, "[i]t is clear the senators did not intend to exempt employees whose primary job responsibilities went beyond fellowship and protection." *Id.*, 2001 WL 78448, *4, 2001 U.S. Dist. LEXIS 23263 at *12. After a review of the DOL's proposed amendments the court found "it is obvious from the proposed amendments that the DOL agrees that the current definition of 'companionship services' under § 552.6 is unreasonable" and that this "alone is sufficient reason to disregard the current version of § 552.6." *Id.*, 2001 WL 78448, *5, 2001 U.S. Dist. LEXIS 23263, at *17. Based on the legislative history and the proposed amendments, the court in *Harris* held

that Section 552.6 was invalid, "to the extent it exempts homemakers from [FLSA] coverage."[5] *Id.*

Prior to *Harris,* all other courts had upheld the validity of the regulations. In *McCune v. Oregon Senior Services Division,* 894 F.2d 1107 (1990) the Ninth Circuit held that the DOL's definition of "companionship services" in Section 552.6 was not contrary to the FLSA and affirmed the district court's granting of summary judgment in favor of defendants.

The plaintiffs in *McCune* were live-in attendants for elderly and infirm individuals unable to care for themselves. The Ninth Circuit, noting the strong deference which is accorded to agencies entrusted to define a specific provision of a statute, held that the 20% limit on general household work was reasonable and upheld the district's courts finding that any household work "related" to the care of the individual would not be counted towards the 20% threshold. In coming to this conclusion, the court quoted parts of the legislative history of the FLSA, which stated:

> The fact that a person performing casual services as baby-sitters or services as companions do some incident of household work does not keep them from begin casual baby-sitters or companions for purposes of this exclusion.

McCune, 894 F.2d 1107, 1111 (quoting H.R.Rep. No. 913, 1974 U.S.Code Cong. and Ad. News at 2845).

---

[5] In *Harris,* although the finding that § 552.6 was invalid mooted the argument that domestic employees hired by agencies should not be exempt, the court did note that Section 552.109(a) was also proposed to be amended for similar reasons Section 552.6 was proposed to be amended. *Id.*, 2001 WL 78448, *5, n. 8, 2001 U.S. Dist. LEXIS 23263, at *17, n. 8.

In dissent in *McCune*, Judge Pregerson did "not propose challenging the agency's interpretation of its mandate when it promulgated section 552.6," but argued that the majority had improperly applied the regulation to the plaintiffs in that case. *McCune*, 894 F.2d at 1114. Judge Pregerson felt that the court should analyze whether the work performed by plaintiffs was actually "incidental" or whether it was only related to the care of their clients. As Judge Pregerson stated, "[t]hough simple laundry work might be 'incidental', what of bed-pan duty, catheterization, and soiled garments for bed-ridden invalids? These duties are certainly related to the care of the attendant's clients, but are by no means incidental." *Id.*

Courts have similarly upheld Section 552.109(a). Most recently, in *Johnston v. Volunteers of America, Inc.*, 213 F.3d 559 (10th Cir.2000), the Tenth Circuit rejected plaintiffs' claims that they were entitled to overtime pay under the FLSA because they were not employed by the individual receiving the care. Finding that Section 552.109(a) was not "arbitrary, capricious, or manifestly contrary to § 213(a)(15)", the Court held that "the fact that domestic service employees are not employed by the individual receiving care, does not alone exclude them from the exemption." *Id.* at 562. In refuting a similar claim, another court has stated, "[p]laintiff has identified no authority, and the Court is unable to locate any, that supports this view of the companionship services exemption. In fact, the Court is not aware of any cases where the subject employees were employed by the individual client, rather than by an agency." *Terwilliger v. Home of Hope, Inc.*, 21 F.Supp.2d 1294, 1299, n. 2 (N.D.Ok.1998).

In regard to Plaintiff's argument that Congress did not intend to remove "enterprise coverage" to those employees who worked for covered agencies, the wording of the

Section 213(a)(15) and the statements of the Administrator of the Wage and Hour Division of the DOL (the "Administrator") support the conclusions of the *Johnston* and *Terwilliger* courts that Section 552.109(a) is valid. Section 213(a)(15), describes who is covered by the companionship exemption as "**any employee** employed on a casual basis in domestic service employment." (emphasis added.) The Administrator, in adopting 552.109(a) explicitly noted this language and stated "[t]his interpretation is more consistent with the statutory language and prior practices concerning other similarly worded exemptions". 40 Fed.Reg. 7404 (1975). It may be that Congress did not intend to exempt employees hired by a third-party. However, based on the wording of the statute and the lack of any clear legislative history discussing this specific issue, this Court may not say that the Administrator's interpretation is arbitrary or unreasonable.

This Court does find the reasoning of *Harris* and the DOL's statements in the proposed amendments somewhat compelling. However, other factors counsel against holding the regulations unenforceable. The strong deference courts must afford to federal agencies regulations, the explicit grant of authority to the DOL to define and delimit Section 213(a)(15), the withdrawal of the proposed amendments, and the fact that these regulations have been in effect for over twenty-eight years, strongly cautions against a finding that these regulations are unenforceable.

Section 213(a)(15) of the FLSA explicitly gives the DOL the right to define the terms "companionship services" and "domestic service." The 20% requirement seemingly attempts to keep the exemption limited to those who predominately provide companionship, which is consistent with the legislative history. In regards to

Section 552.109(a), the Court notes that the reasoning behind the companionship services exemption is arguably to allow those in need of such services to be able to find such assistance at a price they can afford. Whether that service is provided by the direct hiring of an employee or through the use of an agency, the objective is still the same; to allow for the procurement of companionship services without being required to meet the minimum wage and overtime provisions of the FLSA.

The DOL's interpretation of Section 213(a)(15) in 1975 evidence that it believed the regulations were proper at the time the 1974 amendments were enacted. The DOL's withdrawal of the proposed amendments shows that it still believes that these long-standing regulations are appropriate in the current home healthcare environment. Despite amending Section 213(a)(15) seven times since 1074, Congress has chosen not to act. While this Court is sympathetic to home care workers who perform such laborious work under difficult circumstances, the judiciary is not in a position to strike a regulation which is reasonable in light of the DOL's explicit Congressional mandate. Accordingly, the Court finds that Sections 552.6 and 552.109(a) are not arbitrary, capricious or manifestly contrary to the FLSA.

D. The Sufficiency of the Complaint

1. The FLSA Claim

Having found the regulations proper, Plaintiff must properly allege a claim under them. The Court is aware that all of the cases cited above were in the context of motions for summary judgement, not motions on the pleadings pursuant to Rule 12(c). Nonetheless, the Complaint in its current form contains only conclusory alle-

gations that Plaintiff was a home healthcare attendant and that she is therefore entitled to minimum wage and overtime pursuant to FLSA. Plaintiff's counsel clarified at oral argument that his client could not properly allege a claim under the FLSA based on the regulations as they currently stand. Plaintiff's counsel's agreement at oral argument that this was a test case and that his client could not meet the standards of Section 552.6 confirm that Plaintiff can not properly allege a violation of the FLSA and the DOL's regulations promulgated thereunder. Accordingly, Defendants' motion on the FLSA claim is granted.

2. *State Law Claim*

Courts have consistently held that the dismissal of a plaintiff's federal claims merits dismissal of his pendent State law claims. *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 350, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988); *Maric v. St. Agnes Hosp. Corp.,* 65 F.3d 310, 314 (2d Cir.1995) (citing *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)); *In re Merrill Lynch Ltd. P'ships Litig.,* 154 F.3d 56, 61 (2d Cir.1998). Having concluded that Defendants are entitled to judgment on the pleadings as to Plaintiff's underlying federal claims, this Court declines to exercise pendent jurisdiction over the corresponding State law claims. Plaintiff's State law claims are therefore dismissed without prejudice.

CONCLUSION

Defendants' Motion for judgement on the pleadings is GRANTED. Plaintiff's Motion for circulation of a Notice of Pendency and of a Consent to Joinder to similarly situated persons pursuant to 29 U.S.C. § 216(b) is DENIED. The Clerk of the Court is directed to close this case.

SO ORDERED.

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 03-7666

EVELYN COKE,
Plaintiff-Appellant,

—v.—

LONG ISLAND CARE AT HOME, LTD.,
and
MARYANN OSBORNE,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR THE SECRETARY OF
LABOR AS AMICUS CURIAE

INTEREST OF THE SECRETARY OF LABOR

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, the Secretary of Labor ("Secretary") submits this brief as *amicus curiae*. The Secretary has a strong policy interest in defending the Department of Labor's regulations against judicial challenge. The plaintiff candidly referred to this action as a "test case," conceding that she cannot succeed under the regulations as they currently stand. Her claim for back wages under the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. 201, *et seq.*, is based on her argument that the relevant regulations are inconsistent with congressional intent and, therefore, are invalid. Given this posture, the Secretary believes that this Court would derive great benefit from a presentation of her views on this case.

STATEMENT OF THE ISSUE

This case involves a challenge to the validity of the Department's regulations at 29 C.F.R. 552.6 and 552.109(a). Section 552.6 defines "companionship services," which are exempt from FLSA minimum wage and overtime coverage under 29 U.S.C. 213(a)(15), to include related and general, incidental housework. Section 552.109(a) extends this exemption to employees who are employed by an employer or agency other than the family or household using the employees' companionship services. The issue on appeal is whether these legislative rules interpreting the statutory exemption are reasonable and therefore should be upheld.

STATEMENT OF THE CASE

A. *Statement Of Facts*

By decision dated May 23, 2003, the district court granted the defendants' motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), and denied the plaintiff's motion to certify a collective action under 29 U.S.C. 216(b). *Coke* v. *Long Island Care At Home, LTD.*, 267 F. Supp.2d 332 (E.D.N.Y. 2003). The court's decision sets forth only a few rudimentary facts. Maryann Osborne is the owner and sole shareholder of Long Island Care at Home, Ltd. ("Long Island Care"), an agency that provides home healthcare to private individuals. Evelyn Coke ("Coke") has been employed by Long Island Care as a "home healthcare attendant" since 1997. Coke contends that, despite working more than 40 hours a week, she received no overtime payments and was paid less than the FLSA minimum wage. Coke acknowledges, however, that she cannot establish a claim under the FLSA if the Department's regulations that exempt workers who provide "companionship services" are controlling. 267 F. Supp.2d at 332. Thus, she brings this action as a "test case" in order to challenge the validity of these regulations. *Id.* at 341.

B. *Statutory And Regulatory Framework*

At the time that Congress amended the FLSA in 1974 expressly to extend coverage to employees in "domestic service," it excluded from coverage "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (*as such terms are defined and delimited by regulations of*

the Secretary)." 29 U.S.C. 213(a)(15) (emphasis added). *See generally* 29 C.F.R. 552.2.

Under this explicit grant of authority, the Secretary of Labor defined "companionship services," in pertinent part, as follows:

> [T]he term *companionship services* shall mean those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: *Provided, however*, That such work is incidental, *i.e.*, does not exceed 20 percent of the total weekly hours worked.

29 C.F.R. 552.6. The Department's Wage and Hour Division has further clarified in an opinion letter that "such activities as cleaning the patient's bedroom, bathroom or kitchen, picking up groceries, medicine, and dry cleaning would be *related to personal care of the patient* and would be the type of household work that would be *exempt* work for purpose of section 13(a)(15) of the FLSA. However, activities involving heavy cleaning such as cleaning refrigerators, ovens, trash or garbage removal and cleaning the rest of a 'trashy' house would be *general household work* or *nonexempt* work that is subject to the 20 percent time limitation." 1995 WL 1032475 (March 16, 1995) (emphases added).

The Secretary's regulations also state that the term "domestic service employment" as used in section 13(a)(15) "refers to services of a household nature performed by an employee in or about a private home (per-

manent or temporary) of the person by whom he or she is employed." 29 C.F.R. 552.3. However, the Secretary extended the section 13(a)(15) exemption for employees engaged in "companionship services" to those "who are employed by an employer or agency other than the family or household using their services." 29 C.F.R. 552.109(a).

Both these regulations, 29 C.F.R. 552.6 and 552.109(a), were promulgated pursuant to notice and comment rulemaking in 1975, soon after the enactment of the 1974 amendments to the FLSA, and thus have been in effect for approximately 28 years.

C. *The District Court's Decision*

The district court observed that this Court has never expressly ruled on the validity of either of these two regulations, but that nearly all other courts faced with the issue have upheld both. 267 F. Supp.2d at 336 (citing *Johnston* v. *Volunteers of America, Inc.*, 213 F.3d 559, 562 (10th Cir. 2000) (upholding section 552.109(a)); *Salyer* v. *Ohio Bureau of Workers' Compensation*, 83 F.3d 784, 787 (6th Cir.) (upholding section 552.6), *cert. denied*, 519 U.S. 964 (1996); *McCune* v. *Oregon Senior Services Division*, 894 F.2d 1107, 1110-11 (9th Cir. 1990) (same)). The court noted that one district court had recently reached a contrary result. *Id.* (citing *Harris* v. *Dorothy L. Sims Registry*, 2001 WL 78448, at *5 (N.D. Ill. 2001) (invalidating the definition of "companionship services" in section 552.6 "to the extent it exempts homemakers from [FLSA] coverage").

The district court recognized that the Department's longstanding interpretation of the FLSA, promulgated pursuant to specific congressional authorization, is "entitled to great weight" if reasonable. *See Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467

U.S. 837, 844 (1984). The court proceeded to discuss in detail the Department's proposal to amend both regulations, which was published for comment in January 2001, because the court also recognized that an agency's " 'revised interpretation deserves deference.' " 267 F. Supp.2d at 337 (quoting *Rust* v. *Sullivan*, 500 U.S. 175, 186 (1991)).

The Department, pointing to the fact that some home health care workers were performing duties and working in situations not envisioned when the regulations were promulgated, proposed three alternatives to the definition of "companionship services" in section 552.6, each of which would increase the emphasis on *fellowship* (as opposed to the kind of work performed by a maid or household worker) as a "critical component of a companion's duties." 66 Fed. Reg. 5481, 5488 (January 19, 2001). Each alternative would have eliminated the current 20 percent tolerance for general household work. The Department also proposed to amend section 552.109(a) in order to make the section 13(a)(15) exemption applicable "only with respect to the family or household using the worker's services." 66 Fed. Reg. at 5485. The court observed, however, that the Department withdrew these proposed amendments in April 2002. 67 Fed. Reg. 16668 (April 8, 2002).

The court discounted the *Harris* decision because it "relied heavily on the proposed amendments" in reaching its conclusion that the definition of "companionship services" is invalid. 267 F. Supp.2d at 338. As noted by the district court, the court in *Harris* reached this conclusion after the proposed amendments were issued, but before they were withdrawn. Although the court found the reasoning of *Harris* and the Department's statements in the proposed amendments to be "somewhat compelling," it nonetheless concluded that other factors

counseled against holding the unrevised regulations unenforceable. 267 F. Supp.2d at 340. These included "strong deference courts must afford to federal agencies regulations, the explicit grant of authority to the DOL to define and delimit Section 213(a)(15), the withdrawal of the proposed amendments, and the fact that these regulations have been in effect for over twenty-eight years." *Id.*

The court found the definition of "companionship services" contained in section 552.6 to be reasonable and in accordance with the statute because "[t]he 20% requirement seemingly attempts to keep the exemption limited to those who predominately provide companionship, which is consistent with the legislative history." 267 F. Supp.2d at 340. The court upheld section 552.109(a) because it promotes "the reasoning behind the companionship services exemption"—"to allow those in need of such services to be able to find such assistance at a price they can afford. Whether that service is provided by the direct hiring of an employee or through the use of an agency, the objective is still the same; to allow for the procurement of companionship services without being required to meet the minimum wage and overtime provisions of the FLSA." *Id.*

The court specifically rejected the plaintiff's argument that Congress, when it extended coverage to domestic service employees in 1974, did not intend to remove coverage of home healthcare employees employed by third parties, who, prior to 1974, would have been covered under the Act's "enterprise coverage" provisions when they worked for large agencies. In this regard, the court was persuaded by the language of section 13(a)(15) which exempts *"any employee* employed in domestic service employment to provide companionship services" (emphasis added), a point explicitly noted by the Admin-

istrator in promulgating the regulation at section 552.109(a).[1] 267 F. Supp.2d at 340. The court stated, "It may be that Congress did not intend to exempt employees hired by a third-party. However, based on the wording of the statute and the lack of any clear legislative history discussing the specific issue, this Court may not say that the Administrator's interpretation is arbitrary or unreasonable." *Id.*

In sum, the district court, referring to the fact that Congress has done nothing to change the Department's regulations despite amending the FLSA several times since 1974, concluded that "[w]hile this Court is sympathetic to home care workers who perform such laborious work under difficult circumstances, the judiciary is not in a position to strike a regulation which is reasonable in light of the DOL's explicit mandate." 267 F. Supp.2d at 341.

SUMMARY OF ARGUMENT

Because sections 552.6 and 552.109(a) were both promulgated in 1975 in response to an express delegation of authority by Congress and are the products of notice and comment rulemaking, they are entitled to *Chevron* deference. Under *Chevron,* the Secretary's regulations must

---

[1] Actually, the district court mistakenly quoted the language of section 13(a)(15) that applies only to babysitting services, i.e., "any employee employed on a casual basis in domestic service employment." The Department's regulations make clear that the Act's "casual" limitation does not apply to companionship services. *See* 29 C.F.R. 552.106. It is clear, however, that the district court was relying on the statutory language referring to "any employee employed in domestic service employment to provide companionship services." 29 U.S.C. 213(a)(15).

be upheld if they represent reasonable, permissible interpretations of the statute.

The section 552.6 definition of "companionship services" is reasonable because it is consistent with legislative history indicating that Congress did not intend that even the performance of some general, incidental household work would disqualify an employee from being exempt under section 13(a)(15). The inclusion within the "companionship services" exemption, under section 552.109(a), of companionship workers who are employed by third party employers also reflects a reasonable interpretation of the statute. As noted by the courts, section 552.109(a) is consistent with the policy underlying the exemption of making companionship services more financially affordable to the elderly and disabled, who might otherwise be institutionalized.

These regulations are also "entitled to great weight" because they were promulgated soon after the 1974 statutory amendments to the FLSA were enacted and thus have been in effect continuously for over 28 years. Additionally, although the FLSA has been amended numberous times since these regulations became effective, Congress has not taken any of these opportunities to address or amend the Secretary's regulatory interpretations of the "companionship services" exemption. Congress's inaction in this regard is persuasive evidence that the Secretary's interpretations are reasonable and correct.

With one exception, all courts that have addressed the validity of either of these regulations have upheld them. The one exception, *Harris*, is easily discounted since the court improperly relied upon proposed amendments to the regulations that were subsequently withdrawn and, consequently, had no controlling effect.

Finally, the Administrator recently issued an opinion letter reaffirming the Department's position under section 552.109(a) that employees of a third party employer working as domestic service employees in private homes may qualify for the section 13(a)(15) exemption. This opinion letter, since it is consistent with the case law and the policy underlying the "companionship service" exemption, is also entitled to some deference.

ARGUMENT

THE DEPARTMENT'S LONGSTANDING REGULATIONS AT 29 C.F.R. 552.6 AND 552.109(a), WHICH WERE PROMULGATED PURSUANT TO SPECIFIC CONGRESSIONAL AUTHORIZATION AND AFTER NOTICE AND COMMENT RULEMAKING, SHOULD BE UPHELD BECAUSE THEY REPRESENT A REASONABLE CONSTRUCTION OF THE FLSA'S SECTION 13(a)(15) "COMPANIONSHIP SERVICES" EXEMPTION.

A. *Both Section 552.6 And 552.109(a) Are Entitled To* Chevron *Deference.*

"When Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,' and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001) (quoting *Chevron*, 467 U.S. at 843-44). To accord an agency interpretation *Chevron* deference means that "a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because

the agency's chosen resolutions seems unwise, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable." *Id.* at 229 (citations omitted).

Following *Mead Corp.*, this Court has stated that an agency interpretation " 'qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, *and* that the agency interpretation claiming deference was promulgated in the exercise of that authority.' " *Chao* v. *Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 226 (2nd Cir. 2002) (quoting *Mead Corp.* 533 U.S. at 226-27) (emphasis supplied by this Court). This Court determines the appropriate level of deference owed under *Mead Corp.* to the statutory interpretations of the Secretary by considering "whether 'the agency interpretation claiming deference was promulgated in the exercise of [the Secretary's rule-making] authority.' " *Id.* at 227 (quoting *Mead Corp.*, 533 U.S. at 227). If the agency interpretation represents " 'the fruits of notice-and-comment rulemaking or formal adjudication,' " this Court will generally give it full *Chevron* deference. *Id.* (quoting *Mead Corp.*, 533 U.S. at 230). *See also Madison* v. *Resources for Human Development, Inc.*, 233 F.3d 175, 181 n.8 (3rd Cir. 2000) ("afford[ing] deference" to the Secretary's "companionship services" regulations at 29 C.F.R. 552.3 and 552.101 because they are the product of "notice and comment rule making").

In this case, Congress explicitly delegated authority to the Secretary to define and delimit the terms of the "companionship services" exemption contained in section 13(a)(15) of the Act. Coke concedes on appeal that section 552.6 was indeed promulgated in response to this express congressional delegation of authority and is

therefore entitled to *Chevron* deference. Coke argues, however, that the district court erred in giving section 552.109(a) *Chevron* deference because it is an "interpretive" regulation. Coke notes that section 552.109(a) is contained in "Subpart B-Interpretations," whereas section 552.6 is located in "Subpart A-General Regulations." This formulaic distinction does not provide a meaningful basis for according section 552.109(a) a lower degree of deference. Like section 552.6, section 552.109(a) serves to "define and delimit" the terms of the "companionship services" exemption under Congress' express delegation of authority. Similarly, section 552.109(a) is the product of the notice and comment rulemaking that took place shortly after the section 13(a)(15) "companionship services" exemption was enacted in 1974. *See* 40 Fed. Reg. 7405 (Feb. 20, 1975). Therefore, like section 552.6, section 552.109(a) is entitled to *Chevron* deference.[2] *See Madison*, 233 F.3d at 181 n.8 (giving *Chevron* deference to the Secretary's "interpretive" regulation at 29 C.F.R. 552.101).[3]

B. *Section 552.6 Is A Reasonable Interpretation Of The Statute.*

The district court correctly concluded that the definition of "companionship services" contained in section 552.6 is reasonable and in accordance with the statute

---

[2] Moreover, to the extent that the regulation at 29 C.F.R. 552.109(a) may be characterized as the Secretary's interpretation of her own regulation at 29 C.F.R. 552.6, it is entitled to a high degree of deference. *See Christensen* v. *Harris County*, 529 U.S. 576, 578 (2000); *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997).

[3] Since no facts are in dispute and the district court's decision turns upon a question of statutory construction, this Court's review should be de novo. *See United States* v. *Si Lu Tian*, 339 F.3d 143, 156 (2nd Cir. 2003).

because the 20 percent limitation on the amount of general household work that can be performed "keep[s] the exemption limited to those who predominately provide companionship, which is consistent with the legislative history." 267 F. Supp.2d at 340. The legislative history to which the district court refers is that quoted by the Ninth Circuit in *McCune:*

> The fact that persons performing casual services as babysitters or services as companions do some incident of household work does not keep them from being casual babysitters or companions for purposes of this exclusion.

894 F.2d at 1111 (quoting H.R. Rep. No. 913, 1974 U.S.C.C.A.N. at 2845). Thus, Congress intended that even the performance of some general, incidental household work, as well as household work related to the care of the aged or infirm, would not disqualify an employee from coming under the section 13(a)(15) exemption. Indeed, because the statute refers to "companionship services" for individuals who "are unable to *care* for themselves," 29 U.S.C. 213(a)(15) (emphasis added), it is manifestly reasonable for the regulatory definition of "companionship services" to include a significant "care" component that allows for the performance of some household work.

Although this Court has not addressed the validity of section 552.6, both the Sixth and Ninth Circuits have upheld the validity of the regulation's definition of "companionship services." In *Salyer,* the Sixth Circuit affirmed the regulation's inclusion within "companionship services" of " 'household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services.' " 83 F.3d at 787 (quoting 29 C.F.R. 552.6). As the Sixth

Circuit stated, "[W]e cannot say that this regulatory definition of 'companionship services' is either 'arbitrary, capricious, or manifestly contrary to the statute' that it elucidates." *Id.* (quoting *Chevron*, 467 U.S. at 844). In *McCune*, the Ninth Circuit held that the 20 percent limit on general household work was reasonable, and upheld the district court's conclusion that any household work "related" to the care of the individual would *not* be counted towards the 20 percent threshold.

The only contrary authority is easily discounted. In *Harris*, the plaintiffs were "homemakers" who were employed by an agency that instructed them "to go to clients' homes and work a set number of hours for the clients." The plaintiffs were required to perform a certain amount of housework, as well as "prepare meals, wash laundry, and run errands for clients." In determining that section 552.6 was invalid to the extent it covers "homemakers," such as the plaintiffs in that case, the court relied heavily upon the Department's 2001 proposed amendments. *See* 2001 WL 78448, at *4, 5 ("The evidence most damaging to Sims' contention that Congress intended to exempt homemakers from coverage is the DOL's recent proposal to amend the regulations pertaining to the companionship exemption. . . . It is obvious from the proposed amendments that the DOL agrees the current definition of 'companionship services' under § 552.6 is unreasonable. This alone is sufficient reason to disregard the current version of § 552.6."). But, subsequent to the decision in *Harris*, the Secretary withdrew this regulatory proposal. By doing so, the Department, in effect, reaffirmed the "companionship services" regulations as they currently stand. Thus, given that the court relied upon a proposed regulatory interpretation that was subsequently withdrawn by the Department, and given the reasonableness of the regu-

lation as it stands, the *Harris* decision is unpersuasive authority.[4]

Coke's primary argument against the validity of section 552.6 is that its definition of "companionship services" is contrary to the plain language of the statute. In essence, Coke argues that the Secretary's interpretation of "companionship services" is subject to a *Chevron* "step one" analysis, i.e., if Congress "has directly spoken to the precise question at issue" in the text of the statute, the plain meaning of the text governs. *See Chevron*, 467 U.S. at 842-43. Here, however, Congress expressly directed the Secretary to interpret and define the terms of the statutory language at issue. Therefore, the proper question is not "whether the statute unambiguously forbids the agency's interpretation," but "whether the interpretation, for other reasons, exceeds the bounds of the permissible." *See Barnhart* v. *Walton*, 535 U.S. 212, 218 (2002).

Coke also appears to argue that section 552.6 is unreasonable because its definition of "companionship services" would include "employees whose sole function is to perform 'household work' as companions even if they provide *no* supervision or fellowship." Appellant's Brief, p. 22. This argument is based on a misreading of the regulation. Under section 552.6, an employee must "provide fellowship, care, and protection" for a person unable to care for himself in order to meet the requirements of the

---

[4] The court in *Harris* clearly erred, of course, in relying on *proposed* regulations in the first place. *See Greenhalgh* v. *Putnam Savings Bank*, 140 F.3d 427, 429 n.4 (2nd Cir. 1998) ("[P]roposed regulations are not authoritative until finalized."); *Oakley* v. *City of Longmont*, 890 F.2d 1128, 1133 (10th Cir. 1989) (stating that a proposed regulation has no force or effect until "the agency completes formal rulemaking and promulgates final regulations"), *cert. denied*, 494 U.S. 1082 (1990).

"companionship services" exemption. While the regulation allows for the performance of some household work, it must be either "related to" or "incidental" to the "care of the aged or infirm person." *See* 29 C.F.R. 552.6. Thus, contrary to Cokes' suggestion, an employee hired only to perform household work or as a "full-time cook" would not meet the requirements of the regulation. *See* Appellant's Brief, p. 16. An employee who has not been hired primarily to provide "fellowship, care, and protection" will not be considered exempt under the Act or the regulations. *See* 29 C.F.R. 552.6.

C. *Section 552.109(a) Is A Reasonable Interpretation Of The Statute.*

The district court properly upheld section 552.109(a) because it promotes "the reasoning behind the companionship services exemption"—"to allow those in need of such services to be able to find such assistance at a price they can afford. Whether that service is provided by the direct hiring of an employee or through the use of an agency, the objective is still the same; to allow for the procurement of companionship services without being required to meet the minimum wage and overtime provisions of the FLSA." 267 F. Supp.2d at 340.

This rationale for upholding section 552.109(a) is consistent with that provided by the Ninth Circuit in *McCune*. As the Ninth Circuit stated,

> [T]hese critical services reach more elderly or infirm individuals than they otherwise would precisely because the care-providers are exempt from the FLSA. We also note that many private individuals, who do not benefit from federal and state assistance, may also be forced to forego the option of receiving these services in their homes if the cost

> of the services increases. The only alternative for these individuals may be institutionalization.

894 F.2d at 1110. *See also Lott* v. *Rigby,* 746 F. Supp. 1084, 1087 (N.D. Ga. 1990) (noting, after reviewing a Department of Labor administrative opinion, that "Congress created the 'companionship services' exemption to enable guardians of the elderly and disabled to financially afford to have their wards cared for in their own private homes as opposed to institutionalizing them"). *See also Salyer,* 83 F.2d at 788. In this case, the district court correctly noted that this underlying congressional policy is served regardless of "[w]hether that service" is provided by the direct hiring of an employee or through the use of an agency." 267 F. Supp.2d at 340.

Coke argues that section 552.109(a) is entitled to no deference because it is inconsistent with other regulatory interpretations of the "companionship services" exemption. Specifically, Coke argues that the inclusion of employees of third parties within the exemption under section 552.109(a) is inconsistent with the Department's definition of "domestic service employment," i.e., "services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person *by whom he or she is employed."* 29 C.F.R. 552.3 (emphasis added). While this argument may have some superficial appeal, federal courts have nonetheless continued to give deference to the Secretary's interpretation in section 552.109(a). Thus, in denying a challenge to the validity of section 552.109(a), the Tenth Circuit expressly held that "the fact that domestic service employees are not employed by the individual receiving care does not alone exclude them from the exemption." *Johnston,* 213 F.3d at 562. In reaching this conclusion, the court noted that all other courts that have been confronted with the question have rejected challenges to the

validity of section 552.109(a). *See, e.g., Madison* v. *Resources for Human Development, Inc.*, 39 F. Supp.2d 542, 545 n.3 (E.D. Pa. 1999) (holding that, under section 552.109(a), "[a]lthough the plaintiffs are employed by RHD rather than the individuals they serve, that by itself does not exclude them from the exemption."), *vacated and remanded on other grounds,* 233 F.3d 175 (3rd Cir. 2000); *Terwilliger* v. *Home of Hope, Inc.*, 21 F. Supp.2d 1294, 1299 n.2 (N.D. Okla. 1998) (rejecting, as inconsistent with section 552.109(a), the plaintiffs' argument that they were not engaged in "domestic service employment," as defined in 29 C.F.R. 552.3, because they were employed by an agency and not the individual clients).[5]

The Administrator of the Wage and Hour Division also has, in effect, rejected this argument in a recent opinion letter dated August 16, 2002 (copy attached). The Administrator noted there that two previous opinion letters, in an attempt to reconcile section 552.109(a) with section 552.3, "appear to indicate that employees of a third party employer working as domestic service employees in private homes may not qualify for the Section 13(a)(15) exemption unless they are *jointly employed* by the third party employer and the household where they are employed." Based on federal case law upholding the validity of 29 C.F.R. 552.109(a) as written, the Administrator clarified that "under 29 C.F.R. 552.109(a), an employee who is engaged in providing companionship services in private homes and *who is employed by a third party employer other than the family or household receiving the worker's services* is exempt from the minimum wage and overtime require-

---

[5] In *Terwilliger,* the court even stated that it "is not aware of any cases where the subject employees were employed by the individual client, rather than by an agency." 21 F. Supp.2d at 1299 n.2.

ments under Section 13(a)(15) of the Fair Labor Standards Act." (Emphasis added.) The Administrator rescinded and withdrew all prior opinions expressing a contrary view.

This opinion letter is consistent with the case law and the policy reasons underlying the "companionship services" exemption, and is therefore entitled to deference. *See Reid* v. *Miss Paula's Day Care Center, Inc.*, 37 F.3d 1191, 1194 (6th Cir. 1994) ("Because DOL's Wage and Hour Administrator is the primary federal authority entrusted with determining the FLSA's scope, these interpretations [set forth in a Wage-Hour opinion letter and Wage-Hour's Field Operations Handbook], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which the courts and litigants may properly resort for guidance.") (internal quotation marks omitted). *See also Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944); *Freeman* v. *National Broadcasting Company, Inc.*, 80 F.3d 78, 84 (2nd Cir. 1996).

Coke also argues that section 552.109(a) is invalid because it excludes from coverage home healthcare workers who had been subject to "enterprise coverage" prior to the 1974 Amendments.[6] A review of the history

---

[6] Before the district court, Coke relied upon *Homemakers Home and Health Care* v. *Carden*, 538 F.2d 98 (6th Cir. 1976), to support this argument. In that case, the court upheld a stipulated finding of fact that the defendant, a home health care services company, was subject to FLSA enterprise coverage. *Homemakers Home*, however, involved employment prior to the 1974 Amendments, and thus did not address the section 13(a)(15) exemption. It provides no guidance as to whether Congress intended to exempt employees of third parties when it exempted "companionship services" from FLSA coverage under the 1974 Amendments.

of the "companionship services" regulations demonstrates that the Secretary has already considered and resolved this question under her rulemaking authority. Section 552.109, as originally proposed, stated that employees providing companionship services, who are employed by third party employers meeting the Act's "enterprise coverage" requirements, are not exempt under section 13(a)(15) because "their employment was subject to the Act prior to the 1974 Amendments and it was not the purpose of those Amendments to deny the Act's protection to previously covered domestic service employees." *See* 39 Fed. Reg. 35382, 35385 (September 25, 1974). The Department ultimately determined, however, that the specific language of the statute that exempts, without qualification, "any employee employed in domestic service employment to provide companionship services" outweighed any concern for the continuation of coverage of some employees under an "enterprise coverage" theory. *See* 40 Fed. Reg. 7404, 7505-06 (February 20, 1975) ("This interpretation is more consistent with the statutory language and prior practices concerning other similarly worded exemptions."); *cf. Mitchell* v. *Gammill,* 245 F.2d 207, 208-09, 211 (5th Cir. 1957) (holding that the section 13(a)(2) "retail and service establishment" exemption (since repealed) applied without qualification to "any employee" of such an establishment, including those who did no retail or service work); *McComb* v. *Union Stock Yards,* 168 F.2d 375, 377 (7th Cir. 1948) (applying the section 13(b)(2) "rail carrier" exemption to "any employee" of a rail carrier regardless of the type of work performed by that employee). Thus, the Secretary provided a reasonable explanation for including those employees hired by third-party agencies within the section 13(a)(15) exemption.

Coke also argues that promulgation of section 552.109(a) violated the notice and comment requirements of the Administrative Procedure Act ("APA") because "the final regulation was the exact opposite of the proposed regulation." Appellant's Brief, p. 34. The district court declined to consider this argument because it was not properly raised. *See* 267 F. Supp.2d at 336 n.3. Because this issue was not raised in the district court, it is waived. *See, e.g., Local 538 United Brotherhood of Carpenters and Joiners of America* v. *United States Fidelity and Guaranty Co.*, 70 F.3d 741, 743 (2d Cir. 1995). *See also Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule . . . that a federal appellate court does not consider an issue not passed upon below.") *(quoted in Christensen* v. *Kiewit-Murdock Investment Corp.*, 815 F.2d 206, 215 (2nd Cir. 1987)). However, even if this Court were to consider this argument, it has no merit.[7]

In support of her APA argument, Coke cites *National Black Media Coalition* v. *FCC*, 791 F.2d 1016, 1022 (2nd Cir. 1986), and *AFL-CIO* v. *Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985), which stand for the proposition that "if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal." These cases also state that "the final rule must be a 'logical outgrowth' of the rule proposed," and "[t]he test that has been set forth is whether the agency's notice would 'fairly apprise interested persons of the subjects and issues' [of the rulemaking]." *National Black Media*, 791 F.2d at 1022 (quoting *AFL-CIO*, 757 F.2d at 338). The

---

[7] It also stands to reason that the appropriate time for a challenge to the adequacy of the notice and opportunity to comment on the substance of section 552.109(a) would have been soon after the regulation was promulgated, not 28 years later.

Department's promulgation of section 552.109(a) meets these standards.

In *National Black Media,* the court concluded that agency notice was inadequate because the agency's final rule, abandoning a policy set forth in the proposed rule, was based on "critical, yet unpublished, data" that had not been disclosed to the public for review and comment. 791 F.2d at 1023-24. In *AFL-CIO,* the court concluded that notice and comment requirements were violated because the agency had provided no notice that any change was proposed, or even contemplated, with respect to the existing regulation that was substantially modified by the final rule.

This case is unlike either *National Black Media* or *AFL-CIO.* Because the Department was proposing to add 29 C.F.R. Part 552, "defining and delimiting" the terms of the "companionship services" exemption, the public was on adequate notice that newly proposed section 552.109 was subject to change. Moreover, the proposed regulation expressly contained an explanation for why employees of third parties were not considered exempt, i.e., in order not "to deny the Act's protection to previously covered domestic service employees." This explanation was subject to public comment. The Department's ultimate conclusion, that including employees of third-party employers within the exemption is "more consistent" with the statutory language and past practices, is a "logical outgrowth" of the proposed rule. In fact, the process here illustrates the way that notice and comment should work, i.e., the agency made a considered judgment *after* reviewing the comments on a clearly particular proposed rule. *See City of Waukesha* v. *Environmental Protection Agency,* 320 F.3d 228, 245 (D.C. Cir. 2003) ("As we noted in *International Harvester Co.* v. *Ruckelshaus,* 478 F.2d 615, 632 n.51 (D.C.

Cir. 1973), '[a] contrary rule [than that giving the agency the authority to promulgate a final rule different in some particulars from the proposed rule] would lead to the absurdity that . . . the agency can learn from the comments on its proposal only at the peril of starting a new procedural round of commentary.' ") (ellipsis in original).

D. *The Longstanding Nature Of The Department's Regulations Weighs In Favor Of Upholding Them.*

The regulations in question were promulgated in the year following the 1974 statutory amendments, and have now been in effect for over 28 years. The Supreme Court has stated that "a long-standing, contemporaneous construction of a statute by the administering agencies is entitled to great weight." *Leary* v. *United States,* 395 U.S. 6, 25 (1969) (internal quotation marks omitted). The Supreme Court has also held that "[w]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.' " *CFTC* v. *Schor,* 478 U.S. 833, 846 (1986) (quoting *NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 274-75 (1974)). Despite numerous opportunities to do so, Congress has not acted to "correct" the Department's regulatory interpretations of the "companionship services" exemption, which have been in effect since 1975. Furthermore, the Department's withdrawal of the amendments proposed in January 2001 demonstrates that the Department "still believes that these long-standing regulations are appropriate in the current home healthcare environment." 267 F. Supp.2d at 341.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's determination that sections 552.6 and 552.109(a) represent reasonable, permissible interpretations of the statute and, therefore, are not arbitrary, capricious, or manifestly contrary to the FLSA.

Respectfully submitted,

HOWARD M. RADZELY
Acting Solicitor of Labor

STEVEN J. MANDEL
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

FORD F. NEWMAN
Attorney

U.S. Department of Labor
200 Constitution Ave., N.W.
Room N-2716
Washington, D.C. 20210
(202) 693-5555

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 03-7666

Coke v. Long Island Care at Home, *et al.*

DECLARATION OF MARYANN OSBORNE

MARYANN OSBORNE, pursuant to 28 U.S.C. § 1746, and subject to the penalties of perjury, declares as follows:

1. I am a defendant-appellee in the above-captioned appeal and vice president of Long Island Care at Home, Ltd. ("LICAH"), also a defendant-appellee herein (collectively, "Defendants"). I make this declaration in support of Defendants' motion to stay this Court's mandate for ninety (90) days pending Defendants' application for certiorari review in the Supreme Court of the United States. The information contained in this declaration is based upon the personal knowledge I have acquired as an officer of LICAH.

2. LICAH employs approximately forty (40) home health care aides, who provide companionship services to approximately thirty (30) homebound patients.

3. Pursuant to the exemption from federal overtime wage and hour requirements permitted by 29

C.F.R. § 552.119(a), LICAH currently pays its home health care aides $8.00 per hour for an average 70-hour work week. Thus, on average, LICAH home health care aides earn approximately $560.00 per week.

4. Implementation of this Court's ruling invalidating 29 C.F.R. § 552.109(a) will have drastic and harmful consequences for LICAH employees and clients.

5. Given current limitations on government reimbursement for Medicaid patients receiving home health care companionship services, LICAH's existing business plan will result in tremendous and unsustainable losses to the company if LICAH is obligated to comply with federal overtime wage and hour requirements.

6. Thus, in order to comply with federal law while also avoiding such losses, LICAH will be forced to limit each employee's total work schedule to forty (40) hours per week, thereby avoiding higher overtime pay rates, and/or to reduce each employee's hourly wage. As a consequence, most employees will likely suffer an average 43% weekly salary reduction—or, stated differently, most LICAH home health care aides will be limited to earning $320.00 per week rather than their current $560.00 per week.

7. LICAH's homebound elderly and infirm clients will also suffer the brunt of this Court's ruling. Because it will be economically prohibitive for LICAH to assign any one home health care aide to work with a patient for more than forty (40) hours per week, the majority of patients will have

to accept multiple aides entering their homes. Indeed, depending on a given patient's needs and certain reimbursement conditions, the circumstances may require assigning as many as three or more home health care aides each week to assist a client.

8. In my experience, assigning multiple home health care aides to individual patients creates a serious hardship for the patients and their families. The presence of multiple care providers in a home is often very stressful for elderly and infirm individuals. The relationship between home health care aides and their patients is often intimate and grounded in a trust that builds over time. Because of their physical and mental conditions, many elderly and infirm patients suffer from heightened fearfulness, and they find it extremely difficult to acclimate to different care providers. This troubling dynamic often assaults the dignity of patients, undermines the quality of care that they receive, and is therefore detrimental to their well being.

9. Coordinating the presence of multiple care providers in a single home also often imposes a difficult burden on the patient's family members. Numerous shift changes during the day raises the likelihood that gaps in care may occur between shifts—requiring family members to fill in for a missing home health care aide or to leave the patient unattended. When family members are unwilling or physically unable to step in, or are prevented from supplying the necessary care because of other family-related demands or work, serious problem can arise. Moreover, in my expe-

rience, home health care aides who are assigned shorter shifts, and therefore stand to earn less for each client visit than those aides who are assigned longer hours with an individual, have a lesser economic incentive to be reliable and dedicated to their patients.

10. In sum, absent the requested stay, this Court's invalidation of 29 C.F.R. § 552.109(a) will cause serious and irreversible hardships for caregivers and patients alike pending completion of the certiorari process. Because such widespread pain cannot be justified under any logical rationale, Defendants' respectfully request that the Court stay the issuance of its mandate for ninety (90) days.

January 14, 2005

/s/MARYANN OSBORNE
MARYANN OSBORNE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 03-7666

EVELYN COKE,

Plaintiff-Appellant,

—against—

LONG ISLAND CARE AT HOME, LTD.
and MARYANN OSBORNE,

Defendants-Appellees.

DECLARATION IN SUPPORT OF MOTION

ROXANNE TENA-NELSON declares the following:

1. I am vice president of the Continuing Care Leadership Coalition, Inc. ("CCLC"), a non-party that has a strong interest in this case, because compliance with the Court's decision, upon issuance of the mandate, will have serious negative implications for not-for-profit continuing care providers in New York. I am the attorney who previously submitted a motion for leave to file an amicus curiae brief, on behalf of CCLC, in support of the petition for rehearing or rehearing en banc from this Court's July 22, 2004 decision. Therefore, I am familiar with the proceedings in this case.

2. CCLC represents the interests of over 100 not-for-profit and public organizations providing long term

care services in metropolitan New York and beyond. Our membership includes forty-three (43) mission-driven home care providers who offer essential health care and other services to tens of thousands of individuals in their homes. The remainder of our membership relies heavily on the existing home care system in order to provide a full range of long term care services to older and disabled individuals.

3. As charitable, not-for-profit providers obligated to serve their local areas, CCLC's members have a unique commitment to their religious or community-focused missions, strict accountability to their boards and to their communities, and an extensive record of innovation in caring for patients. Our mission-driven members are not focused on creating a bottom-line profit, but rather they reinvest in new services and assist their communities with service enhancements.

4. This declaration is submitted in support of Defendants-Appellees' motion to stay this Court's mandate for ninety (90) days pending Defendants-Appellees' application for certiorari review in the Supreme Court of the United States. Compliance with this Court's decision, upon issuance of the mandate, will have serious negative impact on the access and quality of care for the tens of thousands of older and disabled individuals receiving services through our member organizations based upon significant increased costs for home care services, costs that cannot be absorbed by a financially fragile health care sector that disproportionately relies on government reimbursement.

5. Implementation of this Court's ruling invalidating 29 C.F.R. § 552.109(a) will have drastic and harmful consequences for CCLC members and patients by increasing expenses for other components of New York

State's long term care system, which heavily relies on home care services. The resulting disruption in the continuum of care will negatively affect patients receiving and seeking health services.

IMPLICATIONS OF COMPLIANCE WITH THIS COURT'S DECISION

6. The Court's decision will destabilize New York State's overall long term care system, will diminish labor-management achievements in the metropolitan New York area, will hinder the broader health care system, and will undermine the State's commitment to supporting care of older and disabled individuals at home and in the community.

A. Impact on the Overall Long Term Care System

7. New York's long term care system provides a broad range of options for older and disabled individuals either to receive services at nursing facilities or to live in the community with supportive services. Unfortunately, long term care providers in New York and throughout the nation rely heavily on governmental payments that do not reflect current health care costs. Because CCLC's members are not-for-profit providers, they are particularly committed to serving the low-income population, a large portion who receive services through Medicaid. Based on CCLC's analysis of 2002 audited financial statements, CCLC has determined that over half of the long term care providers in New York are losing money. Of these financially distressed organizations, a substantial percentage operate home health agencies and thus would be subject to additional financial hardship should the Court's decision stand. These

financial strains would compound existing cost pressures associated with expected cuts to the Medicaid system, an increasingly burdensome set of regulatory requirements, a variety of workforce challenges, and resource intensive quality improvement initiatives.

8. In addition, the Court's decision will disrupt other components of the long term care system that rely on home health care services, such as adult day health care, long term home health care or "nursing home without walls" program, senior housing, and managed long term care—a capitated plan that allows nursing home certifiable individuals remain at home with supportive services.

B. Impact on the Labor-Management Achievements

9. This Court's decision will hinder the monumental strides made during the recent labor-management bargaining process in the metropolitan New York area. Long term care providers share an interest in paying home care workers a reasonable wage and benefit package in order to retain talented staff. Home care agencies and home care workers have made progress toward achieving important wage and benefit increases, reflected in recent labor negotiations. However, the Court's decision will significantly disrupt the progress of recognizing the common need for a reasonable wage and benefit package and undermine achievements made between labor and management.

C. Impact on the Broader Health Care System

10. The Court's decision will also obstruct the flow of health care delivery between hospitals and home health care agencies, particularly for individuals in New

York City that are discharged from the hospital to a home health agency through The Bridge Program, expedited hospital discharge program that allows hospital patients to be discharged to home health agencies rather than lingering in the hospital setting. By creating disruptions in the continuity of care provided by home health agencies, the Court's decision impairs the ability of hospitals to discharge patients to more appropriate home and community settings in a timely manner, and thus increases the average length of stay and creates a new financial burden on already financially fragile acute care institutions. Based on CCLC's analysis of 2002 audited financial statements, CCLC estimates that a one day increase in the length of stay for patients in New York hospitals that are discharged to home health agencies would cost the health care system $96 million. Because of the shared responsibilities involved in Medicaid reimbursement, an additional day will increase costs to hospitals, the State, local governments, the federal government, and the workers' compensation system, and will result in less access to hospital beds for patients who need them.

D. Impact on New York's Commitment to Home Care as a Vital Service

11. The Court's decision will undermine New York's commitment to home care as an essential element of the State's long term care system. Since the 1970s, when New York State made a policy decision to make home care services a core element of our long term care system, New York has continued its commitment to offering services in the least restrictive setting by supporting its home and community-based services programs. New York's commitment to home care is consistent with the U.S. Supreme Court's *Olmstead* decision, which found

that state and public agencies must make reasonable accommodations to enable disabled individuals to receive services in the least restrictive setting under Title II of the Americans with Disabilities Act (ADA). The generous mix of home and community-based programs available to older and disabled people has helped over 121,000 older New Yorkers, 76% of whom are in the New York City region, continue to live in the community with the needed supports.

CONCLUSION

12. In sum, absent the requested stay, this Court's invalidation of 29 C.F.R. § 552.109(a) will cause serious and irreversible hardships for caregivers and patients alike pending completion of the certiorari process. Because such widespread pain cannot be justified under any logical rationale, Defendants' respectfully request that the Court stay the issuance of its mandate for ninety (90) days.

WHEREFORE, it is respectfully submitted that Defendants-Appellees' motion for an order to staying the mandate the filing of a petition of a writ of certiorari in the U.S. Supreme Court should be granted.

I declare under penalty of perjury that the foregoing is true and correct. Executed at New York, New York on January 14, 2005.

January 14, 2005

/s/ROXANNE TENA-NELSON
ROXANNE TENA-NELSON
Tel (212) 258-5330 or
(212) 506-5412

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 03-7666

EVELYN COKE,

Plaintiff-Appellant,

—against—

LONG ISLAND CARE AT HOME, LTD.
and MARYANN OSBORNE,

Defendants-Appellees.

DECLARATION IN SUPPORT OF MOTION

SUSAN CHOI-HAUSMAN declares the following:

1. I am of counsel to MICHAEL A. CARDOZO, Corporation Counsel of the City of New York, a non-party that has a strong interest in this case, because compliance with this Court's decision, upon issuance of the mandate, will have serious ramifications for the City's Medicaid-funded personal care services program. I am an Assistant Corporation Counsel in the Appeals Division of the Office of the Corporation Counsel and the attorney who previously submitted a motion for leave to file an amicus brief, on behalf of the City of New York, in support of the petition for rehearing or rehearing en banc from this Court's July 22, 2004 decision. Therefore, I am familiar with the proceedings in this case.

2. I am familiar with the facts contained in this affirmation, based on information received from the First Assistant Deputy Commissioner of the Home Care Services Program at the City's Human Resources Administration ("HRA"), which oversees the Medicaid-funded program that provides personal care services to approximately 50,000 low-income frail elderly and disabled individuals, annually, through the use of approximately 60,000 personal care aides, commonly referred to as home attendants.

3. This affirmation is submitted in support of defendants-appellees' motion to stay the mandate. Compliance with this Court's decision, upon issuance of the mandate, will have serious ramifications for the City's Medicaid funded program, in both economic and noneconomic terms for everyone involved in the program, including the government, the home attendants, and individuals receiving personal care services. Additionally, as outlined in the defendants-appellees' motion papers, the certiorari petition to the Supreme Court will present a substantial question, including a split in the Circuits on an important federal issue. Given the important public interests involved, including the ramifications for the City's Medicaid-funded program upon compliance with this Court's decision, and the ensuing chaos in the program if the City complies with this Court's decision and this Court's decision is then overturned by the Supreme Court, there is good cause for a stay. Therefore, it is respectfully requested that this Court stay the mandate, pending the filing of a petition for a writ of certiorari in the Supreme Court.

OVERVIEW OF THE CITY'S INVOLVEMENT IN THE PROVISION OF PERSONAL CARE SERVICES

4. The provision of health care services in the home has increased significantly in recent years. Since the early 1980's, hospital services have become much more intensive, and daily costs have escalated enormously. At the same time, many aspects of care formerly provided in hospitals and in long term care institutions can be effectively provided in the home. Vulnerable individuals most frequently prefer to receive care at home if possible, and this has resulted in the development of a number of programs to facilitate their ability to do so. The cost of these programs is largely covered by various forms of health insurance, including Medicaid.

5. New York City residents include a large number of low-income frail elderly and disabled individuals, many of whom live alone. New York City has been instrumental in the development of a Medicaid-funded program to provide personal care services under which Medicaid-eligible individuals can obtain assistance with activities of daily living (bathing, toileting, transferring, walking and nutrition) when these services are medically needed to allow them to continue to live at home. Personal care services must be ordered by a client's personal physician, and the determination of the medically-necessary level of personal care service to be provided to Medicaid clients is the responsibility of HRA.

6. Authorized Medicaid-funded services are delivered through contracts with over 90 provider agencies throughout the City. Medicaid clients may be authorized to receive personal care services for periods of time

ranging from 2 or 3 hours, two or three times per week, to continuous oversight, 24 hours each day, for impaired individuals. A home attendant may be required to sleep in the home and, in many ways, become a member of the household. The home attendant may accordingly be scheduled to deliver service for many more than 40 hours per week, and while these services must be medically required, they also require a substantive level of compatibility with the client and the client's family.

7. At the present time, the annual cost to the Medicaid program of personal care service in New York City is approximately $1.6 billion. This amount covers care provided to approximately 50,000 individuals annually by about 60,000 home attendants. There are a number of other modalities under which care is provided to Medicaid-eligible individuals in the home, but the City's oversight responsibility is limited to personal care services, which are discussed here.

RAMIFICATIONS OF COMPLIANCE WITH THIS COURT'S DECISION

8. Compliance with this Court's decision, upon issuance of the mandate, will have serious implications for the Medicaid-funded personal care service program administered by the City. Compliance with this Court's decision is expected to increase the cost of the program and required Medicaid funding by over $263 million per year. While this cost arguably could be somewhat limited by capping each home attendant's hours of service at 40 hours per week, the intimate and ongoing nature of the home attendant/client relationship, as well as clients' general unwillingness to have more than one or two attendants in the home, limit the ability to have multiple

home attendants providing care to a client, without jeopardizing the client's welfare.

Economic Implications

9. This Court's decision is estimated to increase the cost of the City's Medicaid-funded personal care program to the elderly and disabled by over $263 million annually. New York City's Medicaid funding will need to increase from $1.592 billion to about $1.855 billion annually in order to sustain its current client service levels. As set forth below, the estimated additional $263 million annual cost consists of: (a) overtime pay at time and one-half for home attendants who work in excess of 40 hours weekly; (b) an increase in billable and overtime hours for 24 hour daily care provided by "sleep-in" home attendants; and (c) travel time, which will now have to be paid to attendants who serve more than one client and travel between cases.

a. Paid Overtime

10. The City currently authorizes the delivery of approximately 105,777,000 hours of service annually to approximately 42,000 personal care service clients. Services to most of these clients are rendered by not-for-profit providers operating under the third-party employer exemption invalidated by this Court. New York City's HRA staff estimates that approximately 19% (20,098,000) of the personal care service hours provided in City Fiscal Year 2004 were provided by attendants working in excess of 40 hours weekly.

11. These hours would be subject to overtime pay if this Court's decision is upheld. The estimated incremental cost of overtime for the 20 million hours is approximately $102.9 million annually.

b. "Sleep-In" Cases

12. Among the innovations developed by the City to facilitate delivery of personal care services to its frail and vulnerable residents is a service modality known as "sleep-in" service. Under this approach, a home attendant stays with a client for a 24-hour period, during which time the attendant is on paid duty for 12 hours, and is off duty for the remaining 12 hours, and is provided with sleeping accommodations during this time. The "sleep-in" attendant may be roused up to three times during the unpaid hours, and so is available to assist the client with special needs, such as toileting or turning, during the night-time hours. Typically these services are provided by two home attendants during the week—one of whom stays with the client for five 24-hour periods, and the other for the remaining two. This program is well accepted by both clients and home attendants, and reflects the close relationship that is appropriately developed between them.

13. The City currently has 5,033 clients who receive 24 hour daily care from home attendants who "sleep-in". These sleep-in home attendants are present 24 hours daily and receive an hourly wage for each of 12 hours; they are not compensated for the 12 hour "sleep-in" portion of the day but, rather, receive a daily shift differential. Provider agencies are authorized to bill Medicaid for 84 hours weekly (12 hours daily x 7 days) for these cases.

14. Upon compliance with this Court's decision, the non-paid "sleep-in" hours would be limited to 8 hours daily under the Fair Labor Standards Act ("FLSA"). See 29 C.F.R. §785.22 (explaining generally that, where an employee is required to be on duty for 24 hours or more, a bona fide sleeping period of not more than 8 hours may

be excluded from hours worked and that interruptions of sleep by a call to duty must be counted as hours worked). Accordingly, the provider agency service payment authorization for these cases would have to be increased from 12 to at least 16 hours daily. These additional 4 hours daily for 5,033 cases will increase the billable hours for the City's contracted home attendant provider agencies by 7,348,180 hours annually, with a resulting additional annual cost to the government of approximately $112 million for straight-time service.

15. Further, the additional paid hours on these sleep-in cases will also have an overtime impact since the home attendants presently servicing these cases are already working hours that would be subject to overtime pay, upon compliance with this Court's ruling. Accordingly, the 7 million additional hours subject to wages on the sleep-in cases will also be subject to paid overtime. The cost of the overtime (i.e., the additional one-half-time cost) for these 7 million hours is about $37.6 million annually.

c. Travel Time

16. The City's Medicaid-funded personal care service program includes approximately 12,300 clients who receive an average of 21 hours of service weekly. Many of the home attendants service more than one of these cases in order to earn a full-time wage.

17. Presently, home attendants' wages are limited to hours actually worked; the home attendant is not paid for the time spent traveling between cases. Upon compliance with this Court's decision, the time spent in transit by these employees will be subject to wages under the FLSA. *See* 29 C.F.R. §785.38 (explaining generally that travel time spent by an employee in travel as part of his

principal activity, such as travel from job site to job site during the work day, must be counted as hours worked). The City's HRA staff conservatively estimates the annual cost to government as about $11.4 million.

18. In short, the economic impact of this Court's decision is tremendous, and will require a renegotiation of the contracts with the over 90 different provider agencies throughout the City, which actually provide the services.

Limitations on Frequent Change of Attendants

19. It might be argued that some of the costs outlined above could be avoided by limiting the hours of service currently provided to an individual client by a home attendant to a maximum of 40 hours per week. However, there are substantive reasons why this is not readily doable. The relationship between a home attendant and the client, while not limited to delivery of companionship, nonetheless is one of special intimacy and confidentiality. Building such a relationship is not a simple matter, and clients are in general unwilling to enter into such a relationship with more than one or two individuals. Some of the issues affecting this relationship are discussed below:

a. Privacy in the Home

20. Although the home attendant's role is to provide paraprofessional service to a client, the service setting differs significantly from a hospital or a doctor's office, in that the service is rendered in the client's home, and the nature of the service is intensely personal. The home attendant spends up to 24 hours each day in the client's home, tending to needs of an extremely personal nature, such as bathing or toileting. It is therefore essential for

the home attendant to build a trusting personal relationship with the client, as otherwise the attendant's presence will be seen as being overly intrusive, and the client will not cooperate or allow the necessary level of personal intervention.

21. Home attendants are trained and assisted to present themselves professionally to the client. However, to carry out personal care services appropriately also requires acceptance of the home attendant by the client. In many instances it takes a considerable time to build such a relationship, and clients often are very unwilling to enter into such a relationship with more than one or two such individuals. Experience shows that clients often are unwilling to accept alternative coverage when a home attendant takes vacation or sick leave, preferring to suffer lack of what may often be very necessary care until the person with whom the client is comfortable returns from leave.

b. Continuity of Care

22. Although the services provided by the home attendant are limited to assistance with activities of daily living, clients receiving this care are frail elderly and/or disabled, and the service has been determined to be medically necessary. Clearly, all clients are impaired to some extent through ongoing illness and disability, and these problems may well result in additional, immediate clinical needs. The home attendant is required to become familiar with the client's medical circumstances, to assist the client in making physician visits, and to promptly identify and report any changes in the client's clinical status. The home attendant must engage in ongoing interaction with the client regarding the client's health status: to do this requires that the client is com-

fortable with the home attendant and has confidence in sharing intimate information. The home attendant must be knowledgeable about the client's clinical arrangements, and must be able to contact the relevant medical professional if necessary.

c. Family Compatibility

23. In many instances, clients live in the home with other family members. The home attendant's services are limited to caring for the client, but the attendant must be able to render these services in a way that does not result in problems in the household. Building such domestic relationships can difficult and time-consuming. In other instances, the client may live alone. It then becomes the responsibility of the home attendant to assure that the client maintains adequate relationships with children, siblings, etc., and to assist with family relationships in a way that meets the client's requirements and expectations. Such relationships can be demanding and difficult, and the home attendant is required always to place the client's needs before those of the family members who may be placing pressures on both the attendant and the client.

24. In short, the inherently intimate and ongoing nature of the relationship between the home attendant and the client, as well as clients' unwillingness to have multiple attendants in the home, prevent the provision of additional home attendants for each client currently receiving personal care services, in order to keep costs down. As to clients newly entering the Medicaid-funded personal care services program, changes in the provision of personal care services, such as the provision of additional home attendants, may be required, in order to keep costs down.

CONCLUSION

25. In conclusion, complying with this Court's decision, upon issuance of the mandate, will have serious ramifications, in terms of both cost and the provision of care, for the entities and individuals involved in the City's Medicaid-funded personal care services program. There is good cause for a stay of the mandate, in light of: (1) the ramifications to the City's program; (2) the fact that the certiorari petition to the Supreme Court will present a substantial question, including a split in the Circuits on an important federal issue; and (3) and the ensuing chaos in the City's program—including another change in the renegotiated provider contracts and the disruption in the lives of individuals newly receiving personal care services—if the City complies with this Court's decision and this Court's decision is then overturned by the Supreme Court.

WHEREFORE, it is respectfully submitted that defendants-appellees' motion for an order staying the mandate pending the filing of a petition of a writ of certiorari in the Supreme Court should be granted.

I declare under penalty of perjury that the foregoing is true and correct. Executed at New York, New York on January 13, 2005.

/s/SUSAN CHOI-HAUSMAN
SUSAN CHOI-HAUSMAN
Tel. (212) 788-1159 or 1065

UNITES STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 03-7666

EVELYN COKE,

Plaintiff-Appellant,

—against—

LONG ISLAND CARE AT HOME, LTD.,
and MARYANN OSBORNE,

Defendants-Appellees.

DECLARATION OF CAROL RODAT IN SUPPORT OF MOTION OF DEFENDANTS-APPELLEES LONG ISLAND CARE AT HOME, LTD. AND MARYANN OSBORNE FOR A STAY OF THE MANDATE

Carol Rodat, under penalty of perjury, hereby declares as follows:

1. I am the president of the Home Care Association of New York State, Inc. (HCA). I make this declaration in support of the motion by Defendants-Appellees Long Island Care at Home, Ltd. and Maryann Osbome for a stay of the mandate pending the filing of a petition for a writ of certiorari in the United States Supreme Court.

2. The HCA is a not-for-profit organization that works to promote and support high-quality, cost-effec-

tive home care and community services for the citizens of New York State. HCA is an active participant in public policy discussions and legislative initiatives involving home health care services. HCA's membership encompasses approximately 250 home care provider agencies, including primarily non-profit and governmental organizations as well as some for-profit agencies. Collectively, HCA's members serve the majority of Medicare and Medicaid beneficiaries who require home care services in New York.

3. Based on my first-hand knowledge as President of HCA, I believe that the effect of the Panel's decision would be to burden third-party employers providing home companionship services, to the extent that they will be unable to continue providing quality, affordable companionship services to elderly and infirm patients throughout New York State.

4. The budgets of HCA's provider members are severely constrained. Most providers depend on some form of government reimbursement (Medicare and predominantly Medicaid) for the home health care services they provide to the elderly and infirm.[1] Medicaid reimbursement rates are calculated based upon cost report data from two years prior and are adjusted using the national Consumer Price Index.[2] As a result, reim-

---

[1] *Cf.* Policy Brief, Long-Term Care: Medicaid's Role and Challenges 6 (Prepared for the Kaiser Commission on Medicaid and the Uninsured, Nov. 1999), *http://www.kff.org/medicaid/loader.cfin?url=/commonspot/security/getfile.cfin&PageID=13448* (most long-term care is financed by Medicaid program).

[2] *See* N.Y. Pub. Health Law § 3614 (Consol. 2004). In addition, New York State caps the administrative and general costs of all certified home health agencies at the statewide average.

bursement rates for home health care costs do not generally reflect current health care costs.

5. This situation is exacerbated by the fact that government spending on home health care has *decreased* during the last decade.[3] Such spending is likely to remain severely constrained despite the growing demand and need for home health care services.[4]

6. Given the limited public financial resources available for home health care, provider agencies face significant financial constraints. Their budgets cannot bear the cost of compliance with the Panel's holding without additional revenues from external sources, which are unlikely to be forthcoming.[5]

---

[3] *See* Ex. A (Setting the Record Straight: A Response to 'The Plight of New York's Home Health Aides' 1-2 (2004).

[4] *See, e.g.*, Jennifer Steinhauer, New York, Which Made Medicaid Big, Looks to Cut It Back, N.Y. Times, Mar. 3, 2003, at B1 (New York State considering Medicaid a target for budget cuts); *cf.* U.S. Dept. of Health and Human Services, Nursing Aides, Home Health Aides, and Related Health Care Occupations: National and Local Workforce Shortages and Associated Data Needs 11 (Feb. 2004), *ftp://ftp.hrsa.gov/ bhpr/nationalcenter/RNandHomeAides.pdf.* at 8 (despite major cuts in Medicare funding, the Bureau of Labor Statistics predicts that home health aides and personal aides will increase by 62% by 2010).

[5] *See* Ex. B (Letter from Senator Christopher S. Bond, Chairman of the United States Senate Committee on Small Business, to Thomas M. Markey, Acting Administrator, Wage and Hour Division, U.S. Dept. of Labor at 3 (July 26, 2001) (costs of eliminating the third-party employer exemption outweigh any perceived benefits); Ex. C (Letter from Thomas Hamilton, U.S. Dept. of Health and Human Services, to T. Michael Kerr, Administrator, Wage and Hour Division, U.S. Dept. of Labor at 1 (Mar. 20, 2001) (doing away with the third-party employer exemption would cause a dramatic increase in needed Medicaid program expenditures).

7. If required to comply with federal wage requirements for companionship services without such additional funding, providers would be forced to implement measures that seriously disadvantage their home care patients.

8. Given providers' inability to fund any increased overtime, they would have to staff home companion cases on shorter shifts in order to avoid those overtime costs. The limited supply of workers willing to take such short shifts would almost undoubtedly result in uncovered hours. As a result, home care patients would either be denied some periods of care or receive care with less continuity.[6] Many patients may be forced into nursing homes if home care providers can no longer assure adequate and safe services.

9. Home care workers will also themselves be harmed if HCA's provider members are forced to eliminate or shorten shifts. Home health workers who staff cases requiring companionship services depend upon the wages and benefits that result from the hours that they work. Limiting their hours will result in reduced wages as well as loss of benefits in certain situations, likely causing employee attrition and thus heightening the staffing shortage that already exists.

---

[6] For those New York State home care patients who pay for companionship services outof-pocket, the stakes are just as high. If employer agencies pass on the increased costs of wages, patients may be forced to forego services altogether or, at a minimum, to reduce the services they currently receive and require. *See McCune v. Oregon Senior Servs. Div.*, 894 F.2d 1107, 1110 (9th Cir. 1990); Joshua M. Wiener et al., *Catastrophic Costs of Long-Term Care for Elderly Americans*, in Persons with Disabilities: Issues in Health Care Financing and Service Delivery 182 (Joshua M. Wiener et al., eds., 1995).

10. In short, eliminating the third-party employer exception will effect a massive disruption to the delicately balanced system that makes home care—a desired alternative to institutionalization—an affordable and safe option for tens of thousands of home care patients in New York State.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ CAROL A. RODAT
Carol Rodat

Executed on: January 14, 2005

Setting the Record Straight

A Response to "The Plight of New York's Home Health Aides"

Introduction

In February of 2004, 1199/SEIU issued a report, "The Plight of New York's Home Health Aides," which made a number of allegations with respect to home health agencies in New York. The principal allegation is that in New York, home care is a system that by virtue of the way it is organized, allows the home health agencies to "siphon off as much as two thirds of the funding for administrative overhead. . ."

The Home Care Association of New York State, Inc. (HCA) and the New York Association of Homes and Services for the Aging (NYAHSA), membership organizations that represent all types of home care agencies, disagree with this allegation and with the analysis that 1199 applies to the problem of paraprofessional worker wages and benefits. HCA and NYAHSA have continuously advocated for an increase in the home health aide and personal care aide wages and benefits. The fact that much remains to be done in this area is attributable to State and federal policies that have led to under-funding at a time when other costs were escalating.

Looking at this problem requires a broader perspective. In fact, one must examine recent attempts to address the workforce crisis and the home care system as a whole if one is to understand how to begin to solve the problem of the home care workforce.

Workforce Recruitment and Retention Legislation

In 1999, HCA and NYAHSA began to publicize the fact that the home care workforce in New York was

decreasing to the point that some counties had closed intake, thereby limiting access to home care. HCA identified a crisis situation that needed immediate attention. NYAHSA's March 2000 report, *The Staffing Crisis in New York's Continuing Care System*, also called on State policymakers to address serious labor shortages in home care.

Although a valid case was made for the need for additional dollars to recruit and retain the home care workforce, State lawmakers decided to focus only on direct care workers in hospitals and nursing homes, and personal care workers, eliminating the skilled professionals and direct care workers providing care to patients in home health settings. By not advocating for including certified home health agencies (CHHAs) and long term home health care programs (LTHHCPs) in the original Workforce Recruitment and Retention Act funding, 1199/SEIU succeeded in limiting the dollars available to many of New York's home care agencies. Rather than addressing the needs of the entire home care system, State lawmakers elected to provide the downstate personal care workforce with $895 million in workforce dollars over four years. Upstate home care providers received only $69 million in workforce funding over three years—hardly parity.

Although the Legislature finally addressed the needs of the skilled home care workforce in the next State budget, they were given an increase of only 3% or about $50 million through the Medicaid rates. These dollars were (and continue to be) available for mechanisms that help recruit and retain staff, and can be applied in a number of ways in addition to wages and benefits (e.g., bonuses, special services). Moreover, these dollars are available for nursing staff as well as paraprofessionals. As nursing salaries have escalated in New York City

(according to *Crain's Health Pulse*, nurses' adjusted salaries in New York City are 121% of the state average), these limited dollars must be stretched to cover the professional and paraprofessional workforce.

The Problems With Home Care Reimbursement

It is important for policymakers and the public to understand the following facts about the home care system and its personnel, and why it still faces an uncertain future.

- ✓ The State and federal governments have made significant cuts to home care. Over the last 10 years, New York has cut Medicaid home care funding annually. The total (all payers) for the last decade is $1 billion. These cuts have been exacerbated by the fact that Medicare cut funding to New York's home care providers by $261 million. These cuts have had a significant impact on home care's ability to remain competitive in the rates it can pay to all staff.
- ✓ The counties and New York State have reduced access to home care. The counties have three home care programs for which they control access to Medicaid home care services: personal care, the Long Term Home Health Care Program (LTHHCP), and the Managed Long Term Care Program. In an effort to reduce their Medicaid costs, they have begun to limit hours in personal care, change the eligibility rules for the LTHHCP, and delay the processing of patients into home care programs. Some counties refuse to use the LTHHCP, and others severely limit access to the program through arbitrary policies that have no legislative or regulatory support. Most recently, the State implemented new "guidelines" for scoring LTHHCP patients. These changes, if allowed to con-

tinue, are expected to result in at least 30% of the beneficiaries losing access to the program.

- ✓ The State has allowed counties to ignore the Medicaid reimbursement methodology. The State has also allowed the counties to negotiate rates for personal care even though there is a rate methodology required by statute. Some counties take the lowest bid as the prevailing rate, and others take the average of all bids. Regardless, the fact that the State has allowed counties to compress these rates has also contributed to the worker shortage, particularly in upstate counties.
- ✓ The Medicaid rate methodology for CHHAs fails to recognize the current costs of care. Medicaid uses a specific set of steps to calculate rates for skilled home health care. These rates are set for service (nursing, physical therapy, speech pathology, occupational therapy, and home health aide), sponsorship (public and non-public), and geography (upstate and downstate). In order to establish these rates, the State uses cost report data from two years prior. From the cost reports, regional ceilings are established, and a trend factor is used to "update" the rates for inflation since the costs are two years old. The trend factor, however, is now set by the national Consumer Price Index (CPI) averaged over the span of a year. This change made in December of 1999, has cost New York's certified providers $106 million over the last four years (based on an estimated loss of 2.4% for inflation over four years on a base of $4.43 billion in revenues over the same period of time). The State also caps the Administrative and General (A&G) costs of every CHHA at the statewide average of these costs.

Rules for establishing allowable costs are derived from the Medicare fee-for service payment system, and specific allocations are required. Under these rules, home care agencies affiliated with hospitals and nursing homes are allocated a portion of the institutional costs for services the institution provides to the agency (e.g., billing). Moreover, there is a preponderance of nursing oversight that is required by statute and which goes into the A&G costs.

Although the Medicaid home care rate methodology has several components to it, the following points must be emphasized:

- The rates are two years old and do not recognize current costs;
- The inflation update is now tied to the CPI, which makes the inflation update lower than an update that is tied to costs of delivering medical goods and services;
- The CPI update not only fails to recognize the current health care costs, but is averaged over a year so that providers not only have an insufficient update factor but can find themselves overpaid and are then subject to recoupment of any overpayments;
- Individual agency rates are limited to regional ceilings; and,
- Administrative and general costs are capped, and many providers have A&G costs that exceed these caps and must still be covered.

✓ The regulatory structure siphons off dollars for staff. The 1199 paper charges that the CHHAs and Licensed Home Care Services Agencies (LHCSAs) "siphon

off" money for administrative overhead. In fact, the agencies that are certified by Medicaid *and* Medicare are required to comply with State and federal requirements or else they are not allowed to remain in business. These requirements include statutory benefits, supervision, training, scheduling, accreditation, billing, coding, and state audits and surveys. It is important to remember that the money paid for services must also cover the costs of quality improvement through the collection of data using the Outcome and Assessment Information Set (OASIS). OASIS data must be collected on all adult home health patients whose care is publicly funded. Data are collected at the start of care, at 60 day follow-up, when care is resumed after an inpatient facility stay, when there is a significant change in condition, and at discharge.

The Visiting Nurse Associations of America (VNAA) undertook a study of the actual costs for completing OASIS data collection every 60 days. They found these costs to be $105 for every 60-day episode of care. Medicare reimburses the home health providers only $4.32 per episode, and Medicaid's ceilings limit the ability of many providers to be fully reimbursed for the requirement.

- Home care needs capital for technology improvements. Although it is important for home health care agencies to be able to purchase technology to increase the productivity of the workforce, neither Medicaid nor Medicare currently pays for the telehealth technology that can double the number of cases a nurse can manage in a day, and Medicaid in New York has yet to address it—although several other states have. Home care agencies have needed to upgrade computer hardware and software in order to

efficiently operate. But unlike nursing homes and hospitals, home care providers are not able to use the sale of bonds to access capital for equipment. They must factor these needs into their budgets and must have a margin to address the capital equipment needs. Otherwise, they must depend upon grants or foundation support.

- ✓ Medicare is a significant payer of home health and must also be addressed if we are to retain a quality workforce. Depending on the specific home health agency, Medicare can account for anywhere from 40% to 60% of a home health agency's revenue. Medicare moved to a prospective payment system (PPS) in 2000 which pays for an episode of care with an episode being defined as 60 days or less. The change to PPS has lowered the number of visits provided during an episode of care. However, New York still far exceeds other states in its visits, particularly those of home health aides. For example, New York uses on average 21 home health aide visits for patients with diabetes. California uses 10; Michigan, 12; Minnesota, 11; Washington, 9.5; and Wisconsin, 12. While one can argue that New York's higher utilization may be appropriate, it places greater fiscal pressures on providers. It is also important to remember that since the passage of the Balanced Budget Act, Medicare has cut $261 million from provider reimbursement. Also, the recently passed Medicare prescription drug bill took another $14 million from New York's reimbursement by reducing the market basket update.
- ✓ Cash flow is often a problem in home care. In order to process a bill, home care agencies must have a physician signature as well as other necessary doc-

umentation (e.g., OASIS) completed by the nurse. These steps are sometimes delayed, requiring agencies to cover the costs of care without reimbursement.

With respect to the LTHHCP, processing a new patient in New York City can take anywhere from three to four months. During that time agencies admit the patient through an "alternate entry" process. By admitting the patient without approval from the Human Resources Administration (HRA), however, they are putting themselves at risk for the entire cost of care if New York City does not approve the application.

Recommendations

Although the 1199/SEIU paper recognizes the recent cuts in Medicare funding and the fact that nurses are in short supply and have several choices for employment, ***the* recommendations in the *paper fail to address the home health care system as a whole.*** We believe that the following recommendations would begin to address the problem:

1. Stop approaching home care in a piecemeal fashion that favors one type of agency or service over another. This means that the workforce demonstrations that New York State has implemented should *not* favor one section of the state over another, and home care must have parity with hospital and nursing home increases;

2. Streamline the paperwork so that home care can retain nurses, increase productivity, and increase the time spent with patients rather than paperwork;

3. Review the current costs of care alongside the current reimbursement rates and then determine whether or not there is sufficient funding through Medicare *and* Medicaid for LHCSAs, CHHAs and LTHHCPs so that wages and benefits are sufficient to recruit and retain a high quality workforce; and,

4. Provide home health agency access to capital and reimbursement for Medicaid telehealth visits so that technology can extend the home care workforce and increase productivity.

Setting the Record Straight

In addition to our recommendations, HCA and NYAHSA take issue with several of the specific recommendations in the 1199/SEIU paper and would like to clarify others for the record:

- HCA and NYAHSA supported a pass-through of new workforce recruitment and retention funding. HCA even drafted language that would require a pass through of new workforce dollars that were provided to CHHAs, LTHHCPs, and LHCSAs in the 2002 budget. SEIU/1199 did not support this proposal; and,

- Combining the administrative expenses for CHHAs and LHCSAs fails to recognize the true costs of both types of agencies. Instead, it treats the two as one agency, which they are not. LHCSAs have different requirements than CHHAs and their tasks are different. The costs of each need to be examined in light of the current *total* reimbursement that is available for a home health care case (i.e., home health aide and skilled service costs as compared to the total rate for each).

HCA and NYAHSA agree that there is a need for a living wage, health benefits, paid vacation, sick time, and a retirement plan for paraprofessional workers. We also believe that the home health aide and personal care aide need upgraded training and other forms of support that make it easier to work in the health care field (e.g., day care, transportation). We call on 1199 and policymakers to work with us to make sure that the funding is made available to home care for this to become a reality throughout New York State.

[LETTERHEAD]

UNITED STATES SENATE
COMMITTEE ON SMALL BUSINESS
WASHINGTON, DC 20510-6350

July 26, 2001

Mr. Thomas M. Markey, Acting Administrator
Wage and Hour Division
Employment Standards Administration
U.S. Department of Labor
Fair Labor Standards Team
Room S-3516
200 Constitution Ave., N.W.
Washington, DC 20210

By Facsimile: 202-693-1432

Dear Mr. Markey:

On January 19, 2001, the Clinton administration published a proposed regulation to redefine the exemption from the Fair Labor Standards Act (FLSA, the Act) provided by Congress for those employees who provide companionship services in a client's home. On March 19, 2001, I wrote to Secretary of Labor Elaine Chao to request more time to comment on the proposal, specifically with regard to the proposal's impact on small businesses. The Secretary then issued a notice in the Federal Register on April 23, 2001 reopening the docket to accept further comments on this proposal.

Although the Department asserts that this proposal is necessary because of confusion among both employees and employers over the scope of the companionship services exemption, no evidence is offered to support this

claim.[1] It is hard to avoid the perception that this proposed regulation was rushed out the door at the last possible moment in an effort to satisfy supporters of the Clinton administration where no genuine issue or reason for it existed.

Unfortunately, in its rush to get this proposal published before leaving office, the previous administration underestimated the impact of this proposal on the small businesses who provide these services. In addition, the Department's proposal to redefine this exemption goes beyond merely updating it to be consistent with current industry practice, all the way to eliminating effectively the exemption by redefining the duties that qualify for the exemption extremely narrowly. The Department further undermines the availability of the exemption by eliminating it for employees employed by a third party employer who provides companionship services for clients.

This directly contradicts the intent of Congress when it passed the amendments in 1974 which included this exemption. Thus, this proposal attempts to achieve through regulation what the previous administration was not able to achieve through legislation. Accordingly, this proposed regulatory change should be withdrawn as being inconsistent with the authorizing legislation.

The Department Incorrectly Applied the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act

When promulgating a regulation, the Department of Labor is required under the Regulatory Flexibility Act (RFA) to determine if the regulation will have a "significant economic impact on a substantial number of

---

[1] 66 Fed. Reg. 5487, January 19, 2001.

small entities." If so, the Department must then conduct an Initial Regulatory Flexibility Analysis to determine further the impact of the regulation on small businesses, and to identify any alternatives that may be less burdensome to small businesses.[2]

The Small Business Regulatory Enforcement Fairness Act (SBREFA) places the further requirement that the regulation and supporting analyses be submitted to the General Accounting Office and both Houses of Congress for review before it goes into effect. If the regulation will have an impact of $100 million or more on the economy, the regulation can not take effect until 60 days after Congress receives the report or it is published in the Federal Register, which ever is later.[3] The Department asserts that this proposed regulation will not have an impact of $100 million or more and then concludes that because this regulation is not a "major" rule, as defined by SBREFA, "approval by the Congress under SBREFA" is not required.[4]

Such a conclusion is nonsensical as it does not capture the requirements of SBREFA accurately. Congress does not "approve" regulations under SBREFA, it can only disapprove regulations and this is not a function of whether the regulation is a "major rule."

In applying the RFA, the Department erroneously concludes (as explained below) that this proposed regulation will not have a "significant economic impact on a substantial number of small entities." However, the Department proceeds to conduct a regulatory flexibility analysis to support this conclusion even though a regulatory flex-

---

2 5 U.S.C. 603, 605(b).

3 5 U.S.C. 801 (a). This title of SBREFA is commonly referred to as the Congressional Review Act.

4 66 Fed. Reg. 5486.

ibility analysis is only required if the Department concludes that the proposed regulation would have such an impact.[5]

To determine the number of small businesses affected, the Department relics on the U.S. Economic Census for the number of home health care service businesses. The Department concedes that "most of the entities potentially affected by this proposal would likely meet the applicable criteria defining a small business in the home-health-care industry." Indeed, the Department has determined that 98% (16,486 out of 16,895) of the businesses listed in the U.S. Census Bureau's 1997 Economic Census under the home-health-care services industry category would be below the $10 million annual receipts threshold used by the Small Business Administration to define a small business in this industry.[6]

The Department then concludes that, even though this proposal would require these businesses to comply with the FLSA where they have not had to previously, the proposal would not represent a "significant economic impact." Since the comment period was reopened, I have heard from hundreds of small businesses from around the country who have explained in detail the impact this regulation would have on their operations. While these businesses are paying their companionship services employees wages that are well above the minimum wage, the prospect of having to fit their schedules into the statutory requirements for overtime would mean a significant increase in the amounts these employees would earn. Many of the visits with clients include over night stays which last longer than the eight hour work period allowed before overtime must be paid. Requiring

---

[5] *Id.*

[6] 66 Fed. Reg. 5487.

overtime to be paid would mean an extra 50% per hour worked beyond eight. One business indicated this would result in a 75% increase in the cost to the client.

Unfortunately, one of the likely consequences of increasing the cost this much will be that those who need this assistance will not be able to afford this assistance or will be forced to get it from less professional operations. Another consequence of this proposal is that because of the increased cost of operations, it would cause employees to be given less hours thus reducing their income. Both of these outcomes undermine whatever benefit may be achieved by restricting or eliminating the exemption from FLSA for employees providing companionship services.

The Department Proposal Creates More Confusion Than it Cures

The fundamental problem with the proposed changes to this regulation is that employers are not present in the workplace to determine how much time is spent on the activities that the Department has identified as qualifying for the exemption. Despite the Departments assertions that this proposal is necessary to clear up confusion[7], any adjustment to the current definition will certainly create more confusion. With a 26 year history of complying with the current regulation, whatever vagueness is present has been incorporated into employer practices, and employers and employees have come to know what to expect.

No matter which option of the Department is considered, it would require a determination by the employer about how much time an employee in the client's home spends performing specific tasks some of which would

---

[7] *Id.*

allow the employer to take advantage of the exemption and some of which would not. This is all but impossible for these employers to do given the remote location of the work activities. This opens up many possibilities for fraud, confusion, and abuse. Although Congress left the term "companionship services" to be further defined by the Secretary, the term was left without specific definition to reflect the broad category of services that could qualify.[8]

By trying to parse the terms "companionship services" and "fellowship, care and protection" further, the Department is introducing further subjectivity and speculation to an employer's determination of whether the exemption applies. Furthermore, the term "fellowship" which the Department is suggesting must be at the core of the companionship duties to qualify for the FLSA exemption is not even mentioned in the legislation establishing this exemption. Thus, the Department is injecting a requirement which Congress never envisioned or intended.

Eliminating the use of the exemption for third party employers[9] not only would cause problems for these employers, but would likely create difficulties for the clients who previously relied on these companies. Without this exemption, these services arc likely to be significantly more expensive than these elderly individuals can afford thus requiring them to become the employer instead of contracting with a third party employer. Many elderly do not care to be in this role, preferring the sim-

---

[8] Exempting ". . .any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms arc defined and delimited by regulations of the Secretary)", 29 U.S.C. 213 (a)(15).

[9] Proposed revision to 29 CFR 552.109 (a)(c).

plicity and reliability of using a third party who is in the business of supplying home care personnel. The reason for the proliferation of these companies is the simplicity and reliability of the service provided by them. Eliminating the companionship services exemption for third party employers would thus create problems for both these employers and their clients.

The Department Contradicts the Intent of Congress by Eliminating the Companionship Services Exemption

The Department has proposed to eliminate the companionship-services exemption by both narrowing the definition so much as effectively to cancel the exemption, and by eliminating it outright for third-party employers providing these services. Whatever latitude Congress may have provided the Secretary to define further the terms of this exemption, it is unequivocal that Congress intended the exemption to exist. Indeed, in the same 1974 amendments, Congress eliminated the exemption that had previously covered domestic workers. Had it wanted to, Congress would have similarly made companionship services covered by the FLSA. Instead, Congress went out of its way to exempt these services from the FLSA. The Department's attempts to nullify this exemption, therefore, contradict the intent of Congress and suggest that the previous administration was desperately trying to achieve through regulation what it could not achieve through legislation.

For all of these reasons, the proposed changes to the FLSA regulations affecting the companionship services exemption should be withdrawn.

Sincerely,

KIT BOND
Christopher S. "Kit" Bond

[LETTERHEAD]

DEPARTMENT OF HEALTH & HUMAN SERVICES
Health Care Financing Administration
Center for Medicaid and State Operations
7500 Security Boulevard
Baltimore, MD 21244-1850

March 20, 2001

T. Michael Kerr, Administrator
Wage and Hour Division
Employment Standards Administration
U.S. Department of Labor
Attention: Fair Labor Standards Team
Room S-3516
200 Constitution Avenue, NW
Washington, DC 20210

Dear Mr. Kerr:

We are responding to your request for comments on the Department's NPRM to amend the provisions of the Fair Labor Standards pertaining to the exemption for companionship services. We offer the following comments for your consideration.

Fiscal Impact

DOL estimates that the proposed regulation would increase Medicaid program expenditures by somewhere between $30-$40 million. We believe that the Department has underestimated the impact of the proposed regulation on the Medicaid program. For example, the proposed regulation focuses solely on the limited issue of minimum wage and does not take into consideration

other related issues such as the definition of overtime pay and related costs.

Scope of the Regulation

The regulation is designed to address a perceived problem by very narrowly focusing on the definition of companion services. However, the regulation fails to recognize the broader context in which such services are provided. Although DOL speaks to the need to revise the regulation in order to make consistent with the changing times, the regulation fails to accurately reflect the changing environment. There are aspects of the provider continuum other than the category designation that need to be addressed. For example, as mentioned previously, the issue of overtime pay is an important element that is omitted from the proposed regulation. This issue is particularly pertinent when considering how to pay providers who do not reside in an individuals home but instead sleep overnight a few days a week in order to be on-call to provide assistance if needed.

Joint Employment

An increasing trend in the delivery of community-based services is to allow recipients greater control over the provision of community-based services by utilizing the concept of consumer direction. In a model of consumer direction, the client often is the employer of the caregiver. The client, however, may choose to work with a fiscal agent that assists the client with the financial aspects of the employer responsibilities such as handling deductions, such as FICA and State and local taxes, from the provider's paycheck. As proposed, the language governing joint employment would exclude such consumer directed models from the exemption even though the client is the employer.

In closing, we would like to thank you for this opportunity to comment on this important issue. We hope that you will find our comments helpful as the Department moves ahead to develop and implement standards governing the provision of companionship services and we offer our assistance to you in this effort. Please feel free to contact Mary Jean Duckett at 410-786-3294 if you should have any questions or require additional information.

Sincerely,

MARY JEAN DUCKETT

for Thomas Hamilton
Director
Disabled and Elderly Health
Programs Group

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 03-7666

EVELYN COKE,

Plaintiff-Appellant,

—against—

LONG ISLAND CARE AT HOME, LTD.
AND MARYANN OSBORNE,

Defendants-Appellees.

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

AFFIDAVIT OF PHYLLIS A. WANG

PHYLLIS A. WANG, being duly sworn, deposes and states:

1. I am the President of the New York State Association of Health Care Providers, Inc. ("HCP"). I make this affidavit in support of HCP's motion for leave to file a proposed *amicus curiae* brief in support of Long Island Care at Home's petition for panel rehearing and rehearing *en bane in Coke v. Long Island Care at Home, Ltd.*,

(No. 03-7666), 2004 WL 1632642 (2nd Cir. (NY) July 22, 2004).

The New York State Association of Health Care Providers

2. HCP is a not-for-profit industry association of home and community-based health care providers. HCP represents approximately 500 offices of licensed home care service agencies, certified home health agencies, long term home health care programs, hospices and related health care organizations throughout New York State.

3. HCP's purpose is to foster the interests of the health care industry and the public it serves by developing and supporting programs and policies to promote the highest quality of health care for the residents of New York State.

4. As the representative of home care agencies throughout New York State, HCP has unique, industry-wide access to information showing that the Court's decision that the third-party employer exemption contained in 29 C.F.R. § 552.109(a) should no longer be enforced would have major adverse effects on home care agencies, their employees and the many thousands of patients who require the home and community based services they provide.

5. As set forth more fully below, it is critical that the Court consider the grave, real world implications of eliminating the third party employer exemption. HCP seeks leave to serve as *amicus curiae* so that it can offer for the Court's consideration information regarding the substantial, and potentially traumatic, implications of the Court's decision.

Survey of HCP Members

6. In response to this Court's decision in *Coke v. Long Island Care at Home, Ltd.*, HCP undertook a survey of its member agencies to assess the potential impact of the Court's determination that the third party employer exemption set forth in federal regulation at 29 C.F.R. § 552.109(a) should no longer be enforced. The survey results show that the Court's decision would have major adverse effects throughout the home care industry.

7. The survey was designed by HCP staff and sent to all HCP member agencies throughout the State, including branch offices, by e-mail or fax on August 11, 2004. Agencies were asked to submit responses no later than August 26, 2004.

8. Providers could complete the survey on-line through Survey Monkey, an internet survey tool, or by faxing the answers directly to HCP. HCP staff entered the responses received via fax into Survey Monkey and analyzed the full set of data. The data was checked for entry errors, and the survey analysis was checked as well.

9. HCP staff determined the number of respondents for each question and the frequency of each specific response (e.g. the number of "yes" answers and the number of "no" answers to a question), and then calculated the occurrence rate of each response as a percentage of the total number of responses to that question. HCP also calculated sum, average, minimum, maximum and median responses. Open ended responses were listed in the final results as well. Finally, in some cases HCP analyzed the data to reveal the relationship between agency responses to two questions asked in the survey, such as

the percentage of overtime hours to total hours that were paid to paraprofessionals.

10. Twenty percent of member agencies responded to the survey, despite the short timeframe permitted.

11. Ninety-seven percent of respondents were licensed home care services agencies.

12. Agencies were asked to identify the region(s) of the State they serve, using their HCP Chapter affiliation. Chapter affiliations included Long Island (26% of respondents), New York City (19%), Northeastern New York (18%), Central New York (10%), Hudson Valley (10%), Western New York (9%) and the Finger Lakes (3%).

Impact of the Court's Decision on the Home Care Industry

13. HCP's recent survey of its member agencies makes it readily apparent that invalidation of the third party employer exemption would have ramifications throughout the home care industry in New York State. That impact would be particularly severe in New York City, on Long Island and in other downstate areas. The simple fact is that nearly 70% of all responding agencies—and over 90% of downstate respondents—compensate employees for overtime hours in a manner that the Court's decision would make impermissible.

14. On average, 29% of all cases serviced by responding agencies require more than 40 hours per week of service. Those cases, which involve the most infirm patients to whom home health care services are provided, are those most likely to be adversely affected by the Court's decision.

15. HCP stresses that the home care industry strongly supports its workers and recognizes that good compensation is critical to the industry as a whole. Home care paraprofessionals are the backbone of the home and community based service delivery system. The home care industry has been trying to improve wages for these workers for many years.[1]

16. The enormous practical problem the home care industry faces in its efforts to increase employee wages, however, is that the great majority of home care services are funded by Medicare, Medicaid and third-party insurance, which establish reimbursement rates for home care services. Unlike other employers, therefore, home care providers cannot simply raise prices to cover an increase in labor costs.

17. Under the Medicaid program as it is administered in New York, aide services are reimbursed either at a fixed rate or at a rate based on agency costs reported at least two years prior to the date of reimbursement. Although Medicaid reimbursement rates might (at least in theory[2]) be adjusted to accommodate the higher overtime costs that would result from the Court's decision, the reimbursement rates would not reflect the increased

---

[1] It is important to note that the facts alleged by Plaintiff in this action—to wit, that she was not paid either minimum wage or overtime are unusual in the home care industry. Hourly wages paid by survey respondents for home health aides ranged from $6.30 to $11.82.

[2] In fact, the State and counties may, and frequently do, choose not to increase reimbursements, regardless of whether providers have borne increased costs. The recent history of funding for Medicaid and Medicare gives no cause for even a shred of hope that federal, State or local legislatures would increase funding to accommodate higher overtime costs.

overtime costs until two years after the cost increase occurred.

18. The reality is that agencies could not possibly sustain current levels of overtime services, at such dramatically increased cost,[3] for those two years. Home care agency budgets have been severely pared back in the last decade, largely as a result of Medicaid and Medicare reimbursement reductions by the State and federal governments. Agencies lack the resources necessary to absorb such a huge increase in overtime costs. Faced with the prospect of waiting two years for an increase in the Medicaid reimbursement rate, agencies would have no choice but to drastically reduce overtime hours.

19. The result of the Court's decision will be near-term chaos in the home care industry and long-term loss of home care services that are essential to the health and well-being of many New Yorkers—including, in particular, the medically indigent New Yorkers to whom home care services are inaccessible but for the Medicaid program.

Impact on Home Care Workers

20. The unique fiscal constraints to which the home care industry is subject likely will mean that the Court's decision will harm, rather than help, home care workers. As one HCP member noted:

---

[3] For example, an agency paying an hourly wage of $9.00 is currently required under New York law to pay overtime at $7.73 (1 1/2 times the minimum wage of $5.15). 12 N.Y.C.R.R. § 142-2.2. With the elimination of the federal third party employer exemption, the agency would be required to pay an overtime rate of $13.50 (1 1/2 times the regular rate). 29 U.S.C.A. § 207 (West 1998).

> Please tell the powers that be that if this [court decision] was designed to help the paraprofessionals, it will do just the opposite. Medicaid and insurance reimbursement will not allow for the cost of overtime, thereby forcing us to limit hours to 40 per week. Almost all of our aides want the extra time that they will lose.

This response was echoed by more than 60% of survey respondents statewide, and over 85% of downstate respondents, who said that they could no longer authorize overtime hours if they were required to change the overtime wage calculation for paraprofessionals to one and one-half times the employee's regular rate of pay without an offsetting increase in reimbursement.

21. HCP members expressed concern that a reduction in available work hours would result in increased staff turnover: some employees count on overtime hours to make ends meet. The survey results show that, on average, nearly 40% of the agencies' paraprofessionals were paid overtime wages during 2003.

22. In addition, an upstate agency responded that the Court's decision could have a harsh impact on its employees by forcing reductions in base wages:

> NYS Medicaid reimbursement already caps the direct aide wage and training component of our rate. Therefore we already have wage issues. Paying overtime at 1.5x regular wage would necessitate lowering base wages and/or limiting hours of care to clients. Hiring more paraprofessionals is not a real option as labor market is already tapped. This issue would cause serious disruption/discontinuation of services if corresponding rate adjustments do not accompany.

23. In sum, the Court's decision worsens, rather than relieves, the conundrum facing the home care industry in its efforts to improve conditions for its workers. While elimination of the third-party employer exemption would increase overtime rates for home care workers, information from agencies throughout New York State establishes that it would not increase—and in many cases would reduce—actual earnings for workers.

Disruption in Continuity of Care to Patients

24. The impact of the Court's decision would also be felt by home care clients. The elimination of overtime hours would have a powerful impact on the agencies' ability to provide continuity of care to patients—that is, the provision of services consistently by the same personnel to the same patients. Continuity of care is so widely recognized to affect the quality of patient care that New York State regulation requires home care agencies to ensure continuity of care to the extent possible. 10 NYCRR § 766.2(a)(3). Sixty-eight percent of respondents, and 94% of those in the downstate areas, believe that the overtime change will have an adverse impact on their ability to provide continuity of care.

25. Because agencies will have to reduce overtime hours in order to avoid incurring unreimbursed costs, they will be forced to utilize more caregivers—each working a smaller number of hours—to service a single patient. Fifty-three percent of survey respondents specifically stated that they would no longer be able to limit the number of aides assigned to a case, and 66% responded that they would not be able to accommodate client requests that their care be provided consistently by the same aides—that is, aides whom the clients have come to know and who are, by experience, knowledge-

able about the clients' care needs. Among downstate respondents, those numbers increased to 77% and 91%, respectively.

26. Ninety-eight percent of responding agencies, reflecting input received from client satisfaction surveys, complaint calls, and requests for caregivers, said that client satisfaction is greater when there is continuity of care. Ninety-five percent of respondents have clients who request a particular aide. Survey respondents have affirmed the obvious: Individuals served in their homes do not welcome and would not benefit from constant changes in their caregivers. Decreased continuity of care would be undesirable in every respect.

27. Responding agencies also expressed concern that the change in the overtime calculation would result in uncovered shifts and, thus, an inability to service all of those individuals needing home care.

28. In sum, the Court's decision that the third party employer exemption set forth in 29 CFR § 552.109(a) is unenforceable would have a severe impact on the elderly and infirm who are the recipients of companionship services.

29. HCP respectfully requests that the Court grant HCP leave to file HCP's proposed *amicus curiae* brief and grant Defendants-Appellees' petition for panel rehearing and rehearing *en banc*.

PHYLLIS A. WANG

Phyllis A. Wang

Sworn to before me
this 14 day of January, 2005.

HARRY DUNSKAR
Notary Public

Harry Dunskar
Reg # 02DU6098788
Exp. 9/22/07
Albany County, State of New York

Supreme Court, U.S.
FILED
MAY 2 - 2005
OFFICE OF THE CLERK

No. 04-1315

IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD.,

and

MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL SHEN
225 Broadway
Suite 2515
New York, NY 10007
(212) 227-0300

HAROLD CRAIG BECKER
25 E. Washington
Suite 1400
Chicago, IL 60602
(312) 236-4584

CONSTANTINE P. KOKKORIS
225 Broadway
Suite 612
New York, NY 10007
(212) 349-9340

Counsel for Respondent

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Is the Department of Labor's "Interpretation" of the Fair Labor Standards Act, codified at 29 C.F.R. § 552.109(a), providing that employees who are employed in domestic service employment to provide companionship services, but who are employed by entities other than the individual, family or household using their services, are exempt from the Act's minimum wage and overtime requirements under the Act's companionship exemption, 29 U.S.C. § 213(a)(15), entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)?

2. Granting 29 C.F.R. § 552.109(a) the deference it is due under either *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or *Skidmore v. Swift*, 323 U.S. 134 (1944), should the federal courts apply the Department of Labor's interpretation of the Fair Labor Standards Act's companionship exemption, 29 U.S.C. § 213(a)(15), embodied in the regulation?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
STATUTORY AND REGULATORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
ARGUMENTS FOR DENYING THE PETITION	2
I. THIS CASE DOES NOT RAISE ISSUES OF EXCEPTIONAL IMPORTANCE	2
II. THERE IS NO SPLIT IN THE CIRCUITS	7
III. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT	10
A. The Court of Appeals' Decision is Consistent with This Court's Decision in *Mead*	10
B. Petitioners Fail to Demonstrate that the Outcome Below Would Have Been Different had *Chevron* Deference Been Accorded	19
1. The Regulation is Inconsistent with the Text of the Act	19
2. Congress Did Not Intend to Exclude Companions Employed by Third Parties	20
3. The Regulation is Directly Contrary to Another DOL Regulation	23
4. The DOL has Twice Explained that Companions Employed by Third Parties Should Not be Exempt	24

TABLE OF CONTENTS—Continued

Page

5. The Regulation is Inconsistent with Other DOL Regulations 25

C. If the Third-Party Employment Regulation is Not Interpretive, It is Invalid Under the APA 26

IV. PETITIONERS' PROCEDURAL ARGUMENT IS NOT PROPERLY BEFORE THIS COURT AND IS BASELESS 27

CONCLUSION 28

TABLE OF AUTHORITIES

CASES	Pages
AFL-CIO v. Donovan, 757 F.2d 330 (D.C.Cir. 1985)	26
Arkansas Medical Society, Inc. v. Reynolds, 6 F.3d 519 (8th Cir. 1993)	7
Auer v. Robbins, 519 U.S. 452 (1997)	17
Brigham v. Eugene Water & Electric Bd., 357 F.3d 931 (9th Cir. 2004)	17
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	*passim*
Christensen v. Harris County, 529 U.S. 576 (2000)	12, 13, 18
Chrysler Corp. v. Brown, 441 U.S. 281 (1979)	12, 14
Dalheim v. KDFW-TV, 918 F.2d 1220 (5th Cir. 1990)	17
Edelman v. Lynchburg College, 535 U.S. 106 (2002)	12, 13, 14
Freeman v. National Broadcasting Co., 80 F.3d 78 (2d Cir. 1996)	17
Garcia v. United States, 469 U.S. 70 (1984)	20
Johnston v. Volunteers of America, Inc., 213 F.3d 559 (10th Cir. 2001), *cert. denied*, 531 U.S. 1072 (2001)	7-9
Levesque v. Block, 723 F.2d 175 (1st Cir. 1983)	18
Madison v. Resources for Human Development, Inc., 39 F.Supp.2d 542 (E.D.Pa. 1999), *vacated on other grounds*, 233 F.3d 175 (3d Cir. 2000)	9
Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144 (1991)	13
Methodist Hospitals, Inc. v. Sullivan, 91 F.3d 1026 (7th Cir. 1996)	7
Mitchell v. Kentucky Finance Co., 359 U.S. 290 (1959)	2

TABLE OF AUTHORITIES—Continued

	Pages
National Black Media Coalition v. FCC, 791 F.2d 1016 (2d Cir. 1986)	26, 27
Orthopaedic Hosp. v. Belshe, 103 F.3d 1491 (9th Cir. 1997), *cert . denied*, 522 U.S. 1044 (1998)	6, 7
Pediatric Specialty Care, Inc. v. Arkansas Dept. of Human Svcs., 364 F.3d 925 (8th Cir. 2004)	7
Reich v. Gateway Press, Inc., 13 F.3d 685 (3d Cir. 1994)	17
Reich v. Newspapers of New England, 44 F.3d 1060 (1st Cir. 1995)	17
Reich v. New York, 3 F.3d 581 (2d Cir. 1993), *cert. denied*, 510 U.S. 1163 (1994)	17
Service Employees International Union, Local 102 v. County of San Diego, 516 U.S. 1072 (1996)	3
Shaw v. Prentice Hall Computer Publishing, Inc., 151 F.3d 640 (7th Cir. 1998)	17
Skidmore v. Swift, 323 U.S. 134 (1944)	8
Terwilliger v. Home of Hope, Inc., 21 F.Supp.2d 1294 (N.D.Okla. 1998)	9
Thornburg v. Gingles, 478 U.S. 30 (1986)	20
United States v. Mead Corp., 533 U.S. 218 (2001)	*passim*
Wilder v. Virginia Hospital Ass'n, 496 U.S. 498 (1990)	7
Zuber v. Allen, 396 U.S. 168 (1969)	20

STATUTES AND REGULATIONS

5 U.S.C. § 553(b)(3)(A)	14, 26
29 U.S.C. § 202(a)	21
29 U.S.C. § 207(k)	3
29 U.S.C. § 213(a)(1)	15, 16
29 U.S.C. § 213(a)(15)	*passim*

TABLE OF AUTHORITIES—Continued

	Pages
29 U.S.C. § 259(a)	5
42 U.S.C. § 1396a(a)(30)(A)	6
Pub.Law 93-259, 88 Stat. 62 (1974)	21
29 C.F.R. Part 541 (2004)	15
29 C.F.R. Part 552	15
29 C.F.R. § 552.2(c)	15, 16, 18
29 C.F.R. § 552.3	8, 23
29 C.F.R. § 552.6	15
29 C.F.R. § 552.109(a)	*passim*
29 C.F.R. § 552.109(b)	25
29 C.F.R. § 775.1	15
29 C.F.R. § 785.22	4
29 C.F.R § 785.23	4
29 C.F.R. § 790.17(c)	14
N.Y. Comp. Codes R. & Regs. tit. 18, § 505.14	4, 6

OTHER AUTHORITIES

S. REP. No. 884, 75th Cong., 1st Sess. (July 6, 1937)	2
Legislative History of the Fair Labor Standards Amendments of 1974 (1976)	20-21, 25
14 Fed. Reg. 7705 (Dec. 24, 1949)	15
14 Fed. Reg. 7730 (Dec. 28, 1949)	15
39 Fed. Reg. 35382 (Oct. 1, 1974)	16, 21, 22, 26
40 Fed. Reg. 7404 (Feb. 20, 1975)	22-23, 26
66 Fed. Reg. 5481 (Jan. 19, 2001)	3, 5, 10, 22, 24
67 Fed. Reg. 16668 (April 8, 2002)	25
Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381	11, 12, 16, 18
General Accounting Office, *Adults with Severe Disabilities: Federal and State Approaches for Personal Care and Other Services*, GAO/HEHS-99-101 (May 1999)	4

TABLE OF AUTHORITIES—Continued

Pages

Leblanc, Tonner, and Harrington, *State Medicaid Programs Offering Personal Care Services*, 22 HEALTH CARE FINANCING REV. 155 (2001) 4

Reese, *Bursting the Chevron Bubble: Clarifying the Scope of Judicial Review in Troubled Times*, 73 FORDHAM L. REV. 1103 (2004) 11

Stern, Robert L., et al., *Supreme Court Practice* (8th ed. 2002) 19

Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003) 13

IN THE

Supreme Court of the United States

No. 04-1315

LONG ISLAND CARE AT HOME, LTD.,

and

MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Petition does not include the entire text of the statutory provision at issue. In full, 29 U.S.C. § 213(a)(15) exempts from both the minimum wage and maximum hour provisions of the Fair Labor Standards Act (FLSA):

> any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves.

STATEMENT OF THE CASE

Petitioners failed to file a brief in the Court of Appeals.

The decision below, written by Chief Judge Walker, was unanimous and no judge on the Court of Appeals requested that a vote be taken on the petition for rehearing *en banc*. 1a-30a, 31a-32a.

ARGUMENTS FOR DENYING THE PETITION

I. THIS CASE DOES NOT RAISE ISSUES OF EXCEPTIONAL IMPORTANCE

Petitioners argue that this case is of exceptional importance because it would be expensive for employers of unskilled workers providing a range of domestic and personal services to elderly and disabled people in their homes to comply with the minimum labor standards Congress established in the FLSA. In 1937, however, President Roosevelt explained that embodied in the Act "are a few rudimentary standards of which we may properly ask general and widespread observance." S. REP. NO. 884, 75th Cong., 1st Sess. 3 (July 6, 1937). "Failure to observe them," Roosevelt continued, "must be regarded as socially and economically oppressive and unwarranted under almost any circumstances." *Id.* While the FLSA does provide a limited number of specific exemptions, additional payroll costs cannot be a reason for broadly construing an exemption because Congress obviously understood that compliance with the Act's minimum standards would cost employers money and yet this Court has repeatedly held that the Act's exemptions must "be narrowly construed." *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959). Nevertheless, Petitioners argue that this Court should grant review because, if homecare employers are required to comply with the FLSA, they will reduce wages or hours, thereby harming homecare workers or the aged and

disabled people they care for. The Court should reject this argument for four reasons.

First, the argument advanced by Petitioners could be made in every case involving judicial construction of a federal law that has financial consequences for a class of people or entities. Every case construing the police and fire exemptions to the FLSA (29 U.S.C. § 207(k)), for example, has an impact on the finances of police and fire departments across the country and, consequently, on their ability to provide these essential services. But every such case cannot be reviewed by this Court. Thus, this Court has denied review in parallel cases. *See, e.g., Service Employees International Union, Local 102 v. County of San Diego*, 516 U.S. 1072 (1996) (denying review of decision striking down portion of Department of Labor regulation construing the three primary exemptions to the FLSA as applied to all public employees). This Court has never viewed the financial impact of a decision as sufficient reason for granting review.

Second, the factual basis for this argument is not properly before the Court because it consists exclusively of declarations filed with the Court of Appeals in support of Petitioners' Motion to Stay the Mandate. Thus, no court has found the factual assertions in the affidavits to be true and there are good reasons to believe they are not.[1] This Court therefore cannot accept the assertions as fact.

---

[1] Petitioners' central factual assertion—that compliance with the FLSA's overtime requirement will dramatically increase the cost of services provided under the Medicaid program—is highly questionable. The Department of Labor (DOL), relying on data from the Bureau of Labor Statistics and the Department of Health and Human Services (HHS), determined in 2001 that affording minimum wage and overtime protection to homecare workers would "not produce a significant economic or budgetary impact on affected entities." 66 Fed. Reg. 5486 (Jan. 19, 2001). This conclusion was based on the facts that "more than 90 percent of the workers employed in the potentially affected occupational categories already receive the current federal minimum wage of $5.15 an hour or

Third, if the Petitioners and other employers relied in good faith on the regulation in establishing their compensation policies, as Petitioners assert in this Court, the FLSA itself provides a defense against liability. The Act provides that "no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act . . ., if he pleads and proves that the act or omission complained of was in good faith reliance on any

---

higher" and "most of the workers . . . do not regularly work overtime (i.e., more than 40 hours per week)." *Id.* DOL specifically found that "there would be little impact from overtime wage costs if [the employees'] status was changed from exempt to non-exempt." *Id.* This assessment is consistent with other reports on Medicaid personal care services programs. (This is the program referenced in Petitioners' declarations. *See* 89a, 93a, 95a.) HHS funded research found that most states limit the number of hours of personal care services that they will fund under Medicaid and that the average limit is 4.8 hours per day. Leblanc, Tonner, and Harrington, *State Medicaid Programs Offering Personal Care Services*, 22 HEALTH CARE FINANCING REV. 155, 162 (2001). *See also* General Accounting Office, *Adults with Severe Disabilities: Federal and State Approaches for Personal Care and Other Services*, GAO/HEHS-99-101 75-76 (May 1999). In fact, New York places strict limits on the number of hours of personal care services available under its Medicaid program. New York establishes three levels of personal care services. Level I services may not exceed eight hours per week with up to four additional hours available only to those who need some or total assistance with meal preparation and who have no available informal caregivers or access to community resources. Level II and III services may not exceed four hours per day or 28 hours per week, with additional hours of services available only for those requiring total assistance who meet additional conditions. N.Y. Comp. Codes R. & Regs. tit. 18, §§ 505.14(a)(6)(i)(b), 505.14(a)(6)(ii)(b), and 505.14(a)(6)(iii)(c).

In addition, while Petitioners assert that some homecare workers spend 24 hours each day in a client's home, Petition at 10, if this is true, the entire 24 hours are not likely to be considered work time. *See* 29 C.F.R. §§ 785.22, .23.

written administrative regulation . . . or interpretation of the [Wage and Hour Division of the DOL]." 29 U.S.C. § 259(a).

As to prospective compliance, the Second Circuit's decision was issued on July 22, 2004. 1a. Thus, Petitioners and other employers of homecare workers in the Second Circuit have already had almost a full year to adjust their compensation practices to comply with the FLSA by compensating employees for overtime at the statutory rate or spreading work across more employees. Moreover, the Second Circuit's decision should not have come as a surprise to these employers. On January 19, 2001, the DOL published in the Federal Register a proposal to revise the regulation at issue in precisely the manner mandated by the Second Circuit on the grounds that the regulation was "inconsistent with . . . section 13(a)(15) of the FLSA." 66 Fed. Reg. 5485 (Jan. 19, 2001). The DOL articulated precisely the same compelling reasons for rejecting the current regulation adopted by the Second Circuit. *See id.* While this proposed regulation did not become final (for reasons unrelated to its statutory merits as explained *infra* at 25 n.18), its promulgation gave homecare employers ample notice that the current regulation is not consistent with the Act. Yet as of January 14, 2005, Petitioner Long Island Care at Home's Vice President states that Petitioners were not paying their employees in compliance with the FLSA. 79a-80a ¶ 3. Petitioners and other employers have simply chosen to continue to violate the FLSA even after the Second Circuit's decision.

Fourth, Petitioners' argument that reimbursement rates for that portion[2] of their services that is provided under Medicaid limit their ability to comply with the FLSA is not grounds for review and is legally erroneous. All employers could argue that their customers' unwillingness to pay more limits their

---

[2] Petitioners do not suggest that all their services or those of other similar agencies are provided under Medicaid. 79a-82a.

ability to comply with the FLSA. Thus, this cannot be grounds for Supreme Court review.

Moreover, the Medicaid program can, will, and, indeed, must adjust to any increase in costs required by law. New York provides that a factor to be considered in setting personal care service payment rates is "the applicable minimum wage laws." N.Y. Comp. Codes R. & Regs. tit. 18, § 505.14(h)(6)(ii)(d). If there is a change in the applicable wage and hour law or its construction, reimbursement rates can and must be adjusted to compensate for resulting changes in costs. New York specifically permits providers to request revision of reimbursement rates, *inter alia,* where the provider "has incurred new or unanticipated costs for programs or services mandated or approved by the department and . . . the cost report that the provider submitted to the department does not reflect the provider's actual costs for reasons beyond the provider's control." N.Y. Comp. Codes R. & Regs. tit. 18, § 505.14(h)(7)(iii)(c)(2).[3] In fact, the President of the New York State Association of Health Care Providers acknowledges that rates can "be adjusted to accommodate the higher overtime costs." 129a.

In fact, under Medicaid's "equal access" provision,[4] New York's and other states' payment rates "must bear a reasonable relationship to provider costs." *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1498 (9th Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998). If a state did not consider provider

---

[3] None of the declarations submitted by Petitioners state that this mechanism has been invoked without success.

[4] "A state plan for medical assistance must provide . . . such methods and procedures relating to the . . . payment for . . . care and services available under the plan . . . as may be necessary . . . to assure that payments are consistent with . . . quality of care and are sufficient to enlist enough providers so that care and services are available under the plan to the extent such care and services are available to the general population in the geographic area." 42 U.S.C. § 1396a(a)(30)(A).

costs in setting its rates, its action would be "arbitrary and capricious." *Id.* at 1500. If, as Petitioners assert, adequate care requires, in some instances, that homecare workers work more than 40 hours in a week, the states are obligated to consider the resulting obligation to pay for that time at overtime rates in setting reimbursement levels. This is because reimbursement rates must be "high enough to provide for quality care and to ensure access to services." *Id.* at 1497. *See also Pediatric Specialty Care, Inc. v. Arkansas Dept. of Human Svcs.*, 364 F.3d 925, 929-31 (8th Cir. 2004); *Methodist Hospitals, Inc. v. Sullivan*, 91 F.3d 1026, 1030 (7th Cir. 1996) ("the state may (and under § 1396a(a)(30), must) raise the price until the market clears"); *Arkansas Medical Society, Inc. v. Reynolds*, 6 F.3d 519, 530-31 (8th Cir. 1993). *Cf. Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 524 (1990) (parallel provision[5] applicable to covered services provided in institutions "creates a right . . . to have the State adopt rates that it finds are reasonable and adequate rates to meet the costs of an efficient and economical health care provider"). In other words, the states are obligated to set reimbursement rates at levels that insure the availability of adequate services considering applicable wage and hour laws.

For these reasons, this case does not raise issues of exceptional importance.

II. THERE IS NO SPLIT IN THE CIRCUITS

Petitioners argue that the Second Circuit's decision is in conflict with that of the Tenth Circuit in *Johnston v. Volunteers of America, Inc.*, 213 F.3d 559 (10th Cir. 2001), *cert. denied*, 531 U.S. 1072 (2001). This is incorrect for four reasons.

---

[5] *See Arkansas Medical*, 6 F.3d at 525 ("the equal access provision is very analogous to the Boren Amendment examined in *Wilder*").

First, the Tenth Circuit's discussion of this issue is *dicta* as the court holds that the employees at issue were not employed in a "private home" under 29 C.F.R. § 552.3, thus were not engaged in "domestic service employment," and, therefore, did not fall within the companionship exemption. *Id.* at 562-66. The court's holding was that the employees were not exempt. *Id.* at 566. Its cursory discussion of whether employees of a third-party employer *could* fall within the companionship exemption *if* they were otherwise exempt is therefore *dicta*.

Second, as the Second Circuit noted, the Tenth Circuit's decision predated this Court's decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001). 221a-22a. The Second Circuit followed *Mead*, as explained *infra* at 11-12, in holding that the regulation was not entitled to *Chevron* deference. For this reason, the decisions do not conflict.

Third, the employees in *Johnston* did not argue that the third-party employer regulation was not entitled to *Chevron* deference. *See* 213 F.3d at 562. Thus, the Tenth Circuit did not address the issue in relation to which the Petitioners argue that the Second Circuit's decision is in conflict with a decision of this Court—the degree of deference owed the third-party employer regulation. The Tenth Circuit was asked only whether the regulation was valid under *Chevron*, while the Second Circuit was asked whether the regulation was entitled to *Chevron* deference and, if not, whether it was valid under *Skidmore v. Swift*, 323 U.S. 134, 140 (1944). These are different questions and, therefore, the courts' answers to them cannot and do not conflict.

Finally, the decision of the Tenth Circuit does not present this Court with the type of fully analyzed and considered conflict among the circuits that is a precondition of review. The Tenth Circuit's decision contains merely a conclusion

and is wholly barren of analysis. *In full*, the Tenth Circuit's decision states the following concerning the question at issue:

> The contention that the exception does not apply to domestic services employees who are not employed directly by an individual in need of care; or his or her family has been rejected by the courts that have been confronted with the same question. . . . [6] We are persuaded that the secretary's interpretation is not arbitrary, capricious, or manifestly contrary to § 213(a)(15).

213 F.3d at 562. The Second Circuit was, therefore, correct when it observed "that none of these prior cases carefully considered the question before us now." 21a.

Permitting further circuit court adjudication in this area would be prudent because contrary to Petitioners' assertion that the Second Circuit's decision disrupts 30 years of employer reliance on the regulation, the issue is actually of very recent vintage. This is because the homecare industry is

---

[6] The Tenth Circuit here cited footnotes in two District Court decisions, *Terwilliger v. Home of Hope, Inc.*, 21 F.Supp.2d 1294, 1299 n. 2 (N.D.Okla. 1998), and *Madison v. Resources for Human Development, Inc.*, 39 F.Supp.2d 542, 545 n. 3 (E.D.Pa. 1999), *vacated on other grounds*, 233 F.3d 175 (3d Cir. 2000). *See Johnston*, 213 F.3d at 562. These decisions contain no more analysis than *Johnston*. The degree of deference was not at issue in *Terwilliger*. It does not appear that the plaintiff argued that the regulation was not entitled to *Chevron* deference or that it was invalid. Indeed, the Court notes that "Plaintiff has identified no authority, and the Court is unable to locate any, that supports his view of the companionship exemption." 21 F.Supp.2d at 1299 n. 2. In the absence of any argument or authority, the Court simply applies the regulation. Similarly, the footnote in *Madison* does not suggest that the question of the validity of the regulation was even at issue. The Court simply cites the regulation and states that the fact that the plaintiffs are employed by a third party "does not exclude them from the exemption." 39 F.Supp.2d at 545 n. 3. Moreover, as in *Johnston*, the statement is *dicta* as the Court holds that the employees are not exempt because they did not work in a private home. *Id.* at 545-48.

of recent vintage. As the DOL explained in proposing revisions to the companionship regulations in 2001, "[t]he home care industry has changed dramatically since the Department published the 1975 regulations." 66 Fed.Reg. 5483 (Jan. 19, 2001). The combination of a growing demand for long-term care, consumer preference for and social policy in favor of in-home care, and expanded Medicaid and Medicare coverage of such care has led to dramatic, *recent* growth in the number of third-party agencies employing homecare workers and the number of such workers (which tripled between 1988 and 1998). *Id.* Thus, the question addressed by the Second Circuit—whether the companionship exemption applies to employees of third-party agencies—has, as a practical matter, only arisen in the last few years and other courts of appeal should be given an opportunity to consider it before this Court determines whether its review is necessary.

III. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT

A. The Court of Appeals' Decision is Consistent with This Court's Decision in *Mead*

In *Mead*, this Court reaffirmed the principle that "judicial responses to administrative action must continue to differentiate between *Chevron* and *Skidmore*." 533 U.S. at 311. Petitioners, therefore, do not and cannot dispute the distinction drawn by the Second Circuit between legislative and interpretative regulations or the conclusion that interpretive regulations are entitled to a lesser degree of deference. Rather, Petitioners argue that the Second Circuit's classification of the third-party employer regulation as an interpretation entitled only to *Skidmore* deference conflicts with this Court's decisions. Yet, Petitioners do not point to any specific conflict and none exists.

1. The Second Circuit's holding that the third-party employer regulation is an "interpretive" regulation not entitled to *Chevron* deference was expressly based on this Court's decision in *Mead*. *Mead* holds that in order for agency action to qualify for *Chevron* deference, (1) Congress must delegate law making authority to an agency and (2) the agency action must be pursuant to that delegation. This Court held that *Chevron* deference is not appropriate "[1] where statutory circumstances indicate no intent to delegate general authority to make rules with force of law, or [2] where such authority was not invoked." 533 U.S. at 237. The Second Circuit expressly based its holding on the second prong of the *Mead* test,[7] "*Mead* holds that administrative implementation of a particular statutory provision does not qualify for *Chevron* deference unless 'it appears that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" 23a (quoting *Mead*, 533 U.S. at 226-27). Pursuant to the quoted language from *Mead*, the

---

[7] Scholars have described *Mead*'s second prong as follows: "in *Mead* the Court made clear that it is only when the agency actually employs its delegated authority to make a legal determination that it will be accorded *Chevron* deference." Reese, *Bursting the Chevron Bubble: Clarifying the Scope of Judicial Review in Troubled Times*, 73 FORDHAM L. REV. 1103, 1196 (2004). *See also id.* at 1164. They have noted that this prong was reiterated in "[t]hree of the Court's statements." *Id.* at 1164. Indeed, even prior to *Mead*, scholars of administrative law agreed:

> When an agency has a choice to proceed legislatively or nonlegislatively, its contemporaneous description is the most reliable test of what it actually did. . . . [I]t is appropriate to accept the agency's description of which alternative it chose at the time it made the choice. Deference to the agency's label also promotes certainty and predictability of result and provides agencies with reasonable assurance that reviewing courts will honor their decision to proceed nonlegislatively.

Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 389.

Second Circuit correctly held that the regulation "does not qualify for *Chevron* deference because, by the DOL's own account, it was self-consciously not promulgated in exercise of Congress's delegated authority." 23a. The Second Circuit's decision is consistent with *Mead*.[8]

2. Nor is the Second Circuit's decision inconsistent with any of the other decisions of this Court cited by Petitioners only in note 10 of their Petition. *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), was decided prior to *Chevron* and did not involve the question of the degree of deference due agency regulations. Moreover, *Chrysler* cannot stand for the proposition asserted by Petitioners—that all regulations "affect[ing] individual rights and obligations" are legal regulations—or it would reduce the category of interpretative regulations to a virtual null set and render the *Mead* test described above inoperable.[9] In fact, *Chrysler* makes clear that the fact "[t]hat an agency regulation is 'substantive' . . . does not by itself give it the 'force and effect of law.'" *Id.* at 302. Rather, "the exercise of quasi-legislative authority by governmental departments . . . must be rooted in a grant of such power by the Congress." *Id.* Here, the Second Circuit correctly held that the DOL did not "root" its actions in such a grant of power.

Petitioners cite *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), and *Edelman v. Lynchburg College*, 535 U.S. 106, 123-24 (2002) (O'Connor, J., concurring), to suggest that *Chevron* deference is always owed agency interpretations embodied in a regulation. But the quoted language

---

[8] Petitioners cannot argue that the Second Circuit's decision is inconsistent with *Mead* because *Mead* says no more about the second prong of its analysis as its holding is grounded on the first prong. *Id.* at 231.

[9] Far from being accepted by this Court, the "substantial impact test," suggested by Petitioners, had "been rejected by most courts" even prior to *Mead*. Asimow, *Nonlegislative Rulemaking*, 1985 DUKE L.J. at 398.

from *Christensen* is *dicta*, as that case involved an opinion letter, and must be read to be consistent with the Court's citation of its earlier decision in *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157 (1991), for the proposition that "interpretative *rules* . . . are 'not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers.'" *Christensen*, 529 U.S. at 587 (emphasis added). The cited portion of Justice O'Connor's concurrence in *Edelman* merely provides an alternative ground for the majority's holding. In addition, it states only that, because the regulation at issue in that case was codified in the Code of Federal Regulations, it "is binding on all the parties coming before the EEOC, as well as on the EEOC itself." 535 U.S. at 123-24. Justice O'Connor did not suggest that codification of an interpretation in a regulation necessarily binds federal courts under *Chevron*. Moreover, *Mead* states that promulgation of a regulation, even by notice and comment rulemaking, is not determinative of the degree of deference owed. 533 U.S. at 230-31. In *Mead*, this Court explained that "interpretive *rules* . . . enjoy no *Chevron* status as a class." 533 U.S. at 232 (emphasis added).[10]

Finally, the Second Circuit found that the DOL did not comply with the notice and comment requirements of the Administrative Procedure Act when it promulgated the third-party employer regulation. 24a-25a. *See infra* at 26-27.

---

[10] One scholar explained, "It is clear . . . that the Court was greatly concerned that making procedural formality a necessary condition for *Chevron* deference, *as well as a sufficient condition*, would be too crude an approach." Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 349 (2003). The Second Circuit cites language in this article stating that notice and comment procedures afford agencies a "safe harbor." 25a. But this is true only if the agency was seeking to enact legislative rules pursuant to authority delegated by Congress. If, as here, the agency expressly declined to use its delegated authority, it has chosen not to dock in the "safe harbor."

Thus, *Chrysler* supports the Second Circuit's holding because *Chrysler* holds that "a procedural defect in the . . . regulations [—"lack of strict compliance with the APA"—]. . . precludes courts from affording them the force and effect of law." 441 U.S. at 312. *Cf. Edelman*, 535 U.S. at 123 ("The regulation was also promulgated pursuant to sufficiently formal procedures . . . . pursuant to notice-and-comment procedures"). The Second Circuit's decision is consistent with the decisions of this Court.

3. Petitioners do not, in fact, argue that the Second Circuit misconstrued *Mead*. Rather, Petitioners argue that the DOL did exercise its delegated authority when it promulgated the regulation. Petition at 17. This is not grounds for Supreme Court review. Supreme Court Rule 10 provides that "[a] writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."

Moreover, the Petitioners are factually wrong. In 1975, when the regulation was promulgated, the DOL was well aware of the distinction between substantive and interpretive regulations as well as the different degrees of deference they were due and the DOL knowingly and intentionally characterized the third-party employer regulation as an interpretation. The distinction is embodied in the Administrative Procedures Act, 5 U.S.C. § 553(b)(3)(A) and (d)(2). The Attorney General's 1947 *Manual on the Administrative Procedure Act* made clear that only substantive rules "have the force and effect of law." *See Chrysler*, 441 U.S. at 302 n. 31 (quoting *Manual* at 30 n. 3). In fact, the DOL has itself long defined the term "interpretation" "to describe a statement 'ordinarily of an advisory character, indicating merely the agency's present belief concerning the meaning of applicable statutory language.'" 29 C.F.R. § 790.17(c). The DOL has also made clear that "[a]dvisory interpretations announced by the Administrator serve only to indicate the construction of the law

which will guide the Administrator in the performance of his administrative duties." 29 C.F.R. § 775.1 (promulgated December 5, 1946).

With this knowledge of administrative law principles, the DOL has, since as early as 1949, divided its FLSA regulations into "general regulations" and "interpretations." For example, the three primary exemptions to the Act are for executive, professional and administrative employees. *See* 29 U.S.C. § 213(a)(1). Since 1949, the DOL has promulgated regulations relating to these exemptions that are expressly classified as "general regulations" and "interpretations." *See* 14 Fed. Reg. 7705, Subpart A—General Regulations (Dec. 24, 1949); 14 Fed. Reg. 7730, Subpart B—Interpretations (Dec. 28, 1949); 29 C.F.R. Part 541, Subpart A—General Regulations, Subpart B—Interpretations (2004).

Following this pattern, the regulations promulgated after the adoption of the 1974 amendments were divided into "General Regulations," promulgated pursuant to DOL's express authority to "define[] and delimit[]" the term "companionship services," and "Interpretations." *See* 29 C.F.R. Part 552, Subparts A and B; 40 Fed. Reg. 7404, 7405, 7406 (Feb. 20, 1975). The regulations themselves expressly state that "[t]he definitions required by section 13(a)(15) [of the FLSA] are contained in §§ 552.3, 552.4, 552.5 and 552.6." 29 C.F.R. § 552.2(c). The regulation defining companionship services, 29 C.F.R. § 552.6, is within these "General Regulations" providing the statutorily required definitions. In contrast, the DOL classified its regulation concerning third-party employment among its "Interpretations." *See* 29 C.F.R. Part 552, Subpart B, § 552.109(a). The DOL's 1974 Notice of Proposed Rulemaking also clearly stated that it was the DOL's intention "to add a new 29 CFR Part 552 defining and delimiting, *in Subpart A*, the terms . . . 'employment to provide companionship services for individual who (because of age or infirmity) are unable to care for themselves and

setting forth, *in Subpart B*, a statement of policy and interpretation concerning the application of the Fair Labor Standards Act to domestic service employees." 39 Fed. Reg. 35382 (Oct. 1, 1974) (emphasis added). The Second Circuit thus correctly held that "the regulation at issue . . . is effectively conceded by the DOL not to have been promulgated pursuant to Congress's express legislative delegation in § 213(a)(15)." 23a.[11]

The courts of appeal are in complete harmony in according the DOL's "interpretations" of the statutory exemptions only *Skidmore* deference. In two previous decisions, the Second Circuit specifically held that the DOL's "interpretations" of the § 213(a)(1) executive, administrative and professional employee exemptions are not entitled to *Chevron* deference. Considering the DOL's regulations relating to the exemption of administrative employees, the court held, "In contrast to the controlling authority given the Secretary's legislative rules—i.e. those promulgated pursuant to an express grant of congressional authority—the respect accorded the Secretary's interpretive regulations depends on their persuasiveness."

---

[11] Petitioners' arguments to the contrary are unconvincing. First, Petitioners' primary argument simply takes the words "by virtue of section 13(a)(15) [of the FLSA]" in the regulation out of context. Petition at 18. The regulation does not state that it was promulgated pursuant to the authority given DOL in § 13(a)(15) to "define[] and delimit[]" the exemption's terms, but merely cites the statutory basis for the exemption of companions. 29 C.F.R. § 552.109(a). Obviously, "both legislative and interpretive rules frequently interpret the meaning of language in a statute" and thus cite the statute. Asimow, *Nonlegislative Rulemaking*, 1985 DUKE L.J. at 384. Therefor, mere citation of a statute cannot render a rule legislative. Second, the reference to § 213(a)(15) as "authority" for all the regulations "unless otherwise noted" is also not on point when the regulations specifically notes that only §§ 552.3-552.6 contain "[t]he definitions required by section 13(a)(15)." 29 C.F.R. § 552.2(c). Finally, the 1974 Notice of Proposed Rulemaking fully supports the Second Circuit's decision as explained in the text *supra* at 15-16.

Reich v. New York, 3 F.3d 581, 587 (2d Cir. 1993), *cert. denied*, 510 U.S. 1163 (1994). The Second Circuit reached the same conclusion concerning the codified "Interpretations" of the Act's professional employee exemption in *Freeman v. National Broadcasting Co.*, 80 F.3d 78, 83 (2d Cir. 1996) ("not binding and do not have the force of law"). All other circuits that have addressed the issue have agreed. *See Shaw v. Prentice Hall Computer Publishing, Inc.*, 151 F.3d 640, 642 (7th Cir. 1998) ("interpretive regulations" concerning administrative and professional employee exemptions "serve as guides to the Secretary's view of the Act's application . . . [but] do not have the force of binding law"); *Reich v. Newspapers of New England*, 44 F.3d 1060, 1070 (1st Cir. 1995) (unlike general regulations, interpretations concerning professional employee exemption entitled to *Skidmore* not *Chevron* deference); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 699 n. 18 (3d Cir. 1994) ("The DOL interpretations [of the professional employee exemption] do not have the force of law."); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1228 (5th Cir. 1990) (according interpretation of professional employee exemption only *Skidmore* deference). In fact, the Ninth Circuit, like the Second, cited *Mead* to support its holding that "these interpretive rules are not binding" and "enjoy no *Chevron* status." *Brigham v. Eugene Water & Electric Bd.*, 357 F.3d 931, 940 (9th Cir. 2004).

Petitioners' final argument is that the Second Circuit should have deferred to the argument of DOL's counsel in its amicus brief that the third-party employer regulation is entitled to *Chevron* deference. Petition at 22. But the question before the court was not one of construction of the regulation, but classification of the regulation as legal or interpretive. This classification is not "a creature of the Secretary's own regulations" and thus the Secretary's arguments are entitled to no deference. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The DOL's brief did not in any way construe the regulation. *Cf. id.* (brief "interprets the salary-

basis test," contained in a DOL regulation, "to deny exempt status" under specific conditions). Rather, the brief contains a mere assertion followed by a factual observation. DOL's counsel's complete argument on this point states:

> Like section 552.6, section 552.109(a) served to 'define and delimit' the terms of the "companionship services' exemption under Congress' express delegation of authority. Similarly, section 552.109(a) is the product of the notice and comment rulemaking that took place shortly after the section 13(a)(15) "companionship services" exemption was enacted in 1974.

66a. These two sentences contain no construction of the regulation. The brief contains only a spare legal argument which is not entitled to deference.[12]

Moreover, even if the first sentence quoted above is considered a construction of the regulation, no deference is warranted because "*Auer* deference is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). Here, the regulations expressly and unambiguously state that the "definitions required by section 13(a)(15) [of the FLSA] are contained in [the "General Regulations," specifically] §§ 552.3, 552.4, 552.5 and 552.6" and thus not in the Interpretations, including § 552.109(a). 29 C.F.R. § 552.2(c). Counsel's assertion is directly contrary to the clear statement in the regulations.

---

[12] Again, scholars agree that "[s]ubsequent characterization by counsel" of a regulation as legislative or interpretive is not entitled to deference. Asimow, *Nonlegislative Rulemaking*, 1985 DUKE L.J. at 390 n. 40. *See also Levesque v. Block*, 723 F.2d 175, 181 (1st Cir. 1983) ("agency's contemporaneous characterization of its action" is "highly relevant," but it would be "both unfair and disingenuous to allow the Secretary to say later [through counsel] that he didn't mean it. . . . [W]e are inclined to give little weight to an agency's *post hoc* reconstruction of its efforts and intentions.")

. Finally, the DOL's counsel did not claim to be construing the regulation and thus did not seek deference for his construction in the Second Circuit and neither did the Petitioners as they failed to file a brief below.

The Second Circuit expressly and correctly followed this Court's decision in *Mead* in according the third-party employment regulation only that deference required by *Skidmore*.

B. Petitioners Fail to Demonstrate that the Outcome Below Would Have Been Different had *Chevron* Deference Been Accorded

In the text of the Petition, the only error Petitioners argue the Second Circuit made was in the level of deference it accorded the regulation. Petitioners do not argue that, had the Second Circuit granted *Chevron* deference, the outcome would have been different. Petitioners make this argument only in a footnote. Petition at 25-26 n. 13. Yet this Court ordinarily denies review when a reversal would not change the relative rights of the parties in any concrete fashion. *See* Robert L. Stern et al., *Supreme Court Practice* 231 (8th ed. 2002). Because the regulation would be held invalid even if it was accorded *Chevron* deference, this Court should not grant review.

1. *The Regulation is Inconsistent with the Text of the Act*

The FLSA does not exempt employees employed "to provide companionship services" to the elderly or infirm. Rather, it exempts only employees *"employed in domestic service employment* to provide companionship services" to the aged or infirm. 29 U.S.C. § 213(a)(15) (emphasis added). The third-party employer regulation renders the phrase "employed in domestic service employment" wholly superfluous. Congress did not intend the phrase to be meaningless.

Rather, it intended it to have its ordinary meaning—employed in a household by the household. The regulation is thus inconsistent with the plain meaning of the full text of the exemption.

2. *Congress Did Not Intend to Exclude Companions Employed by Third Parties*

Consistent with the plain text, the overall purpose of the amendments and their legislative history both demonstrate that Congress did not intend to exempt third-party employers, such as Petitioner Long Island Care at Home,[13] from minimum wage and overtime requirements, allowing them, for example, to pay their employees less than the minimum wage so long as they provide companionship services.

Congress intended the term "domestic service employment" to encompass only employment within a home by the homeowner. "[T]he authoritative source for legislative intent . . . [—] the Committee Reports on the bill"—so state. *Thornburg v. Gingles*, 478 U.S. 30, 44 n.7 (1986).[14] The Senate Report explained that "[t]he generally accepted meaning of domestic service relates to services of a household nature performed by an employee in or about a private home of a person by whom he or she is employed." 2 *Legislative History of the Fair Labor Standards Amendments of 1974* 1524 (1976) (S. REP. NO. 93-690, 93rd Cong., 2d Sess. 20) (hereinafter *Legislative History*). *See also* 2 *Legislative*

---

[13] Petitioner employs approximately 40 homecare workers and possibly other workers. 79a.

[14] *See also Garcia v. United States*, 469 U.S. 70, 76 (1984). Likewise, in *Zuber v. Allen*, 396 U.S. 168, 186 (1969), this Court explained that "[a] committee report represents that considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation."

History 2144 (H.R. REP. NO. 93-913, 93rd Cong., 2d Sess. 35 (March 15, 1974)).

It was only domestics employed within the home by the home owner who were even at issue in Congress in 1974 when the exemption was adopted. The FLSA had not previously extended to such domestics employed by individuals and families because there was doubt about whether they were engaged in interstate commerce. Thus, the amendments contained an express finding that domestic service employment affects commerce. Pub.Law 93-259, §7, 88 Stat. 62 (1974) (codified at 29 U.S.C. § 202(a)).[15] There was no such question concerning domestics employed by agencies. The pre-1974 Act already covered domestic employees employed by third parties. *See* 39 Fed. Reg. 35385 (Oct. 1, 1974) (DOL finding that "[e]mployees who are engaged in providing . . . companionship services and who are employed by an employer other than the families or households using such services . . . . [were] subject to the Act prior to the 1974 amendments.") The amendments extended coverage to domestics employed by those in whose homes they worked

---

[15] That the intent of the amendment was to extend the Act's coverage to domestics employed by individuals is made clear by the objection frequently expressed during the debates over the amendments that such an extension would impose an intolerable burden on "housewives." *See, e.g.*, 1 *Legislative History* at 250, 281, 727, 952, 954 (1976) (119 Cong. Rec. 18155 (June 5, 1973), 18341 (June 6, 1973), 24365 (July 17, 1973), 24797 (July 19, 1973), 24798 (July 19, 1973)) ("putting on the private individual the onus"); 2 *Legislative History* 1676, 1815 (120 Cong. Rec. 4708 (Feb. 28, 1974), 5275 (March 5, 1974)) ("adding additional record-keeping and other chores for the American housewife"). Echoing this theme, the Secretary of Labor's statement of opposition to the amendments made clear that he understood "domestic service" to mean "[a] household who hires a maid." 2 *Legislative History* 1814 (120 Cong. Rec. 5275 (March 5, 1974)). "It may be unrealistic to expect accurate recordkeeping, the Secretary observed, because "[h]omemakers are not engaged in business in the traditional sense with experience in maintaining business records." *Id.*

except for those domestics employed as baby-sitters and companions. Obviously, Congress did not intend for the exception to the extension of coverage to be broader than the extension itself.

This was exactly the reasoning of the DOL when it considered the matter in the very wake of the amendments in the fall of 1974. On October 1, 1974, the DOL published a proposed interpretive regulation in the Federal Register providing, "Employees who are engaged in providing . . . companionship services and who are employed by an employer other than the families or households using such services, are not exempt under section 13(a)(15) of the Act." 39 Fed. Reg. 35385 (Oct. 1, 1974). The DOL reasoned, "This results from the fact that their employment was subject to the Act prior to the 1974 Amendments and it was not the purpose of those Amendments to deny the Act's protection to previously covered domestic service employees." *Id.*[16]

The notice of final rule making replaced the proposed regulation with its opposite—the current regulation. 40 Fed.

---

[16] When the DOL proposed amending this regulation in 2001, it again explained:

> Under the 1974 Amendments, Congress extended coverage of the FLSA to domestic service employees who were not previously covered, i.e., those who worked only for a private family and not for a covered enterprise. Anyone who prior to 1974 had worked for a covered placement agency, for example, but who was assigned to work in someone's home, would have been covered previously by the FLSA. The Department believes that Congress did not intend the 1974 amendments to change the status of workers already covered by the FLSA, but only intended to exclude casual baby-sitters and companions from those newly covered by the law, that is, those exclusively employed by the homeowner or family member.

66 Fed. Reg. 5485 (Jan. 19, 2001).

Reg. 7404 (Feb. 20, 1975). The DOL noted the change, but provided a wholly inaccurate explanation:

> The one major change in Part 552 is in § 552.109 which deals with 'third party employment.' This section as originally proposed would not have allowed the section 13(a)(15) . . . exemption for employees, who, although providing companionship . . . are employed by an employer or agency other than the family or household using their services. On further consideration, I have concluded that these exemptions can be available to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services.

40 Fed. Reg. 7404 (Feb. 20, 1975). This reasoning is flawed because it does not accurately reflect the terms of the exemption. The exemption does not apply to "any employee engaged in companionship services" as the DOL suggested, but only to "employees *employed in domestic service employment* to provide companionship services." 29 U.S.C. § 213(a)(15) (emphasis added). By leaving out the critical limiting terms, the DOL improperly broadened the scope of the exception to the extension of the Act's coverage beyond the scope of the extension itself.

Congress did not intend to exempt companions employed by third parties.

3. *The Regulation is Directly Contrary to Another DOL Regulation*

The third-party employer regulation is directly contrary to another DOL regulation and, therefore, both regulations cannot be upheld even granted *Chevron* deference. The Department's definition of domestic service covers only "service of a household nature performed by an employee in or about a private home (permanent or temporary) *of the person by whom he or she is employed.*" 29 C.F.R. § 552.3 (emphasis added). Companionship services are a subset of

domestic services. *See* 29 U.S.C. §213(a)(15) ("any employee employed in domestic service employment to provide companionship services"). Thus, under the DOL's own definition of "domestic service employment," companionship services must be performed for "the person by whom [the provider of such services] is employed." As the Second Circuit correctly found, there is thus a "stark internal inconsistency" between the regulation providing that companions may be employed by third parties and the definition of domestic services of which companionship services are a subset. 27a-28a.[17] Even granted *Chevron* deference, both regulations cannot possibly be upheld.

4. *The DOL has Twice Explained that Companions Employed by Third Parties Should Not be Exempt*

As explained *supra* at 22-23, when the DOL first proposed regulations concerning the companionship exemption in the fall of 1974, it proposed an interpretive regulation providing that companions employed by third parties were not exempt. In 2001, the DOL proposed a revision of the third-party employer regulation on the grounds that the current regulation is inconsistent with Congress' intent. 66 Fed. Reg. 5485 (Jan. 19, 2001). The DOL proposed a regulation providing that companions employed by third parties are not exempt. 66 Fed. Reg. 5488 (Jan. 19, 2001). In neither case did the DOL provide an adequate explanation of why it did not adopt the

---

[17] In the proposed revisions of these regulations discussed *infra* at 24-25, the DOL agreed that "the current regulations contain an internal inconsistency, because they allow the companion . . . exemption[] to be applied to an employee employed by someone other than the person in whose private home the work is being performed." 66 Fed. Reg. 5485 (Jan. 19, 2001).

proposed regulation as final.[18] Thus, while the agency's current regulation is to the contrary, its twice articulated, uncontradicted and persuasive reasoning demonstrates that Congress did not intend to exempt employees of third parties.

5. *The Regulation is Inconsistent with Other DOL Regulations*

The Department's regulations provide that babysitters employed by third parties are not exempt under the § 213(a)(15) exemption. 29 C.F.R. § 552.109(b). Yet the statutory exemption pairs "babysitting services" and "companionship services" and the two were talked about in the same breath in Congress. In fact, companionship services were defined by reference to babysitting services.[19] There is no basis for treating companions employed by third parties differently than babysitters employed by third parties. Thus, the DOL's regulation are internally inconsistent on this point as well.

For all of these reasons, even if the regulation was accorded *Chevron* deference, it is clearly inconsistent with

---

[18] The faulty explanation for the rejection of the original proposed regulation is discussed *supra* at 23. The 2001 proposal was withdrawn in 2002, *see* 67 Fed. Reg. 16668 (April 8, 2002), but, as the Second Circuit explained, on grounds "that have no bearing on the . . . relevant question of what Congress intended in 1974." 28a.

[19] During floor debate in the Senate, Senator Williams, Chair of the Labor Subcommittee, explained the word "companion" with reference to babysitting:

> We use the situation in which people are in a household not to do household work but are there, first, as babysitters. I think we all have the full meaning in mind of what a babysitter is there for—to watch the youngsters. "Companion," as we mean it, is in the same role—to be there and to watch an older person, in a sense.

1 *Legislative History* 963 (119 Cong. Rec. 24801 (July 19, 1973)). After this explanation, another senator interjected, "In other words, an elder sitter," and Senator Williams replied, "Exactly." *Id.*

Congress' intent and, thus, the Second Circuit correctly declined to apply the regulation.

C. If the Third-Party Employment Regulation is Not Interpretive, It is Invalid Under the APA

If this Court were to grant review and hold that the regulation is not interpretive, then it would have to remand to the Second Circuit for a determination of whether the regulation is nevertheless invalid because it was not promulgated in compliance with the Administrative Procedure Act's notice and comment requirements. 5 U.S.C. § 553(b). The Second Circuit would be bound by its own precedent to hold the regulation invalid for this reason.

As explained *supra* at 22-23, the notice of proposed rule making that led to the third-party employment regulation informed the public that employees of third parties were *not* exempt, *see* 39 Fed. Reg. 35385 (Oct. 1, 1974), but the final regulation provided exactly the opposite. *See* 40 Fed. Reg. 7404 (Feb. 20, 1975). This did not satisfy the APA's notice requirement under Second Circuit law.

The Second Circuit has held that "if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal." *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986) (quoting *AFL-CIO v. Donovan*, 757 F.2d 330, 338 (D.C.Cir. 1985)). This was clearly the case here, where the final regulation was the exact opposite of the proposed regulation. Indeed, this case is almost identical to *Black Media*. There, the FCC promulgated a notice of proposed rule making announcing it would include a minority preference policy in rules governing applications for broadcast licenses, but "then it declined to do so in its final report without providing a meaningful opportunity for comments as required by [the APA]." 791 F.2d at 1018. Here, the DOL announced that the exemption would not apply to employees

of third parties, and then the DOL promulgated a final regulation providing that it would. This did not comply with the APA. As the Second Circuit found, the regulation was promulgated after "substandard notice and comment procedure." 25a. A legislative regulation promulgated without complying with the APA is invalid, *see, e.g., Black Media*, 791 F.2d at 1024.

Thus, if the regulation is legislative, it would be held invalid by the Second Circuit under the APA.

IV. PETITIONERS' PROCEDURAL ARGUMENT IS NOT PROPERLY BEFORE THIS COURT AND IS BASELESS

The second question presented by Petitioners is based on a procedural argument—that the court of appeals should not have declined to defer to the regulation "at the pleading stage of the proceedings, without any consideration of facts that support the agency's judgment." Petition at 13. This argument is not properly before this Court and is baseless.

The argument is not properly before this Court because it was Petitioners who moved for judgment on the pleadings in the District Court. 36a. At that time, Petitioners made no attempt to introduce the evidence they now say is necessary despite knowing that the validity of the regulation was at issue. *See* Petition at 6, 5a. In addition, neither Petitioners nor the DOL made this argument in the court of appeals. In fact, Petitioners did not file a brief in the court of appeals. The procedural argument has, therefore, been waived.

Moreover, the procedural argument is baseless. The "facts that support the agency's judgment" are only those that were before the agency and relied on by the agency. They are legislative not adjudicative facts. Petitioners were free to cite those facts in their motion for judgment on the pleadings and in their appellate brief (had they filed one). Petitioners were,

therefore, not prejudiced by their own action of filing a motion for judgment on the pleadings which precluded the introduction of evidence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL SHEN
225 Broadway
Suite 2515
New York, NY 10007
(212) 227-0300

HAROLD CRAIG BECKER *
25 E. Washington
Suite 1400
Chicago, IL 60602
(312) 236-4584

CONSTANTINE P. KOKKORIS
225 Broadway
Suite 612
New York, NY 10007
(212) 349-9340

Counsel for Respondent

* Counsel of Record

(10)

JAN 5 - 2005

OFFICE OF THE CLERK

No. 04-1315

IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD.,

and

MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

MICHAEL SHEN
225 Broadway
Suite 2515
New York, NY 10007
(212) 227-0300

HAROLD CRAIG BECKER *
25 E. Washington
Suite 1400
Chicago, IL 60602
(312) 236-4584

CONSTANTINE P. KOKKORIS
225 Broadway
Suite 612
New York, NY 10007
(212) 349-9340

Counsel for Respondent

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Is the Department of Labor's "Interpretation" of the Fair Labor Standards Act, codified at 29 C.F.R. § 552.109(a), providing that employees who are employed in domestic service employment to provide companionship services, but who are employed by entities other than the individual, family or household using their services, are exempt from the Act's minimum wage and overtime requirements under the Act's companionship exemption, 29 U.S.C. § 213(a)(15), entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)?

2. Granting 29 C.F.R. § 552.109(a) the deference it is due under either *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or *Skidmore v. Swift*, 323 U.S. 134 (1944), should the federal courts apply the Department of Labor's interpretation of the Fair Labor Standards Act's companionship exemption, 29 U.S.C. § 213(a)(15), embodied in the regulation?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
ARGUMENTS FOR DENYING THE PETITION	2
I. THE POLICY MEMORANDUM SHOULD NOT AND WILL NOT ALTER THE COURT OF APPEALS' ANALYSIS OF THE REGULATION	2
II. EVEN IF THE POLICY MEMORANDUM ALTERS THE COURT OF APPEALS' ANALYSIS OF WHETHER TO ACCORD CHEVRON DEFERENCE, THE COURT WILL REACH THE SAME RESULT	6
CONCLUSION	7

TABLE OF AUTHORITIES

CASES:	Page
Auer v. Robbins, 519 U.S. 452 (1997)	2, 3
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	i, 3
Christensen v. Harris County, 529 U.S. 576 (2000)	3
Levesque v. Block, 723 F.2d 175 (1st Cir. 1983)	5
Skidmore v. Swift, 323 U.S. 134 (1944)	i
United States v. Mead Corp., 533 U.S. 218 (2001)	4
STATUTES AND REGULATIONS:	
29 U.S.C. § 213(a)(15)	i
29 C.F.R. § 552.2(c)	3-4
29 C.F.R. § 552.109(a)	i, 2, 4
OTHER AUTHORITIES:	
Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381	4-5
Reese, *Bursting the Chevron Bubble: Clarifying the Scope of Judicial Review in Troubled Times*, 73 FORDHAM L. REV. 1103 (2004)	4
Stern, Robert L., et al., *Supreme Court Practice* (8th ed. 2002)	7

IN THE

Supreme Court of the United States

No. 04-1315

LONG ISLAND CARE AT HOME, LTD.,

and

MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

The Solicitor General urges this Court to summarily vacate the Second Circuit's decision and remand this case to the Court of Appeals for reconsideration in light of the recent promulgation of Department of Labor Advisory Memorandum No. 2005-1 (Dec. 1, 2005). The Court should not summarily vacate or remand, but should instead deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

The Department of Labor participated fully in this case when it was before the Court of Appeals. The Department

filed a brief as amicus curiae. 55a-78a. In fact, counsel for the Department appeared at oral argument and presented argument in lieu of argument from the Defendant-Petitioner, Long Island Care at Home, Ltd.

The Court of Appeals issued its decision on July 22, 2004. The Petition for a Writ of Certiorari was filed in this Court on March 29, 2005. This Court invited the Acting Solicitor General to file a brief expressing the views of the United States on June 6, 2005. On December 1, 2005, without notice and comment rule-making, the Department promulgated Advisory Memorandum No. 2005-1. Brief for the United States at 1a-17a. The Solicitor General then filed the Brief of the United States on December 22, 2005, relying primarily on the Advisory Memorandum.

ARGUMENT FOR DENYING THE PETITION

I. THE POLICY MEMORANDUM SHOULD NOT AND WILL NOT ALTER THE COURT OF APPEALS' ANALYSIS OF THE REGULATION

The Policy Memorandum should not alter the Court of Appeals' analysis of the regulation, 29 C.F.R. § 552.109(a), for five reasons. First, in *Auer v. Robbins*, 519 U.S. 452 (1997), this Court made clear that "a '*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack" is not entitled to deference. *Id.* at 462 (quoting *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988)). This is exactly what the Policy Memorandum is. In none of the cases cited by the Solicitor General to support his claim of deference did the agency promulgate its interpretation only after a court struck down its regulation as inconsistent with the governing statute.[1]

---

[1] Indeed, the Court of Appeals' decision on the question of whether the regulation is a legal or interpretive regulation is consistent with a line of precedent dating back to at least 1993 holding that regulations promulgated by the Department construing statutory exemptions to the Fair

Second, the question at issue is *not* one of construction of a Department regulation, but rather classification of the regulation as legal or interpretive and determination of whether the regulation is consistent with the statute. The latter question is clearly not one involving construction of the regulation. Yet the Policy Memorandum consists almost exclusively of an argument addressed to the latter question—whether the regulation is consistent with the statute. Brief for the United States at 1a-16a. Only on the last two pages of the Memorandum does the Department address the classification of the regulation in a discussion occupying less than one page. *Id.* at 16a-17a.

The classification question is also not one involving construction of the regulation. The discussion of this issue in the Policy Memorandum does not contain any form of construction of any of the provisions of the regulation itself. Brief for the United States at 16a-17a. The classification of the regulation is not "a creature of the Secretary's own regulations" and thus the Secretary's arguments in the Policy Memorandum are entitled to no deference. *Auer*, 519 U.S. at 461.

Third, even if the Policy Memorandum were considered a construction of the regulation relevant to the classification issue, no deference is warranted because "*Auer* deference is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). Here, the regulations expressly and unambiguously state that the "definitions required by section 13(a)(15) [of the Fair Labor Standards Act] are contained in [the "General Regulations," specifically] §§ 552.3, 552.4, 552.5 and 552.6"

Labor Standards Act that are classified as "interpretations" by the Department and expressly not adopted pursuant to the Department's authority to "define and delimit" the statutory terms are not entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Court of Appeals cited these earlier precedents. 22a. *See also* Brief in Opposition at 16-17.

and thus not in the Interpretations, including § 552.109(a). 29 C.F.R. § 552.2(c). The Policy Memorandum's assertion is directly contrary to this unambiguous statement in the regulations and is thus not entitled to deference.

Fourth, it is the agency's contemporaneous classification of the regulation that is relevant under *United States v. Mead Corp.*, 533 U.S. 218 (2001), not its *post-hoc* assertion in the Policy Memorandum. *Mead* holds that in order for agency action to qualify for *Chevron* deference, (1) Congress must delegate law making authority to an agency and (2) the agency action must be pursuant to that delegation. This Court held that *Chevron* deference is not appropriate "[1] where statutory circumstances indicate no intent to delegate general authority to make rules with force of law, or [2] where such authority was not invoked." 533 U.S. at 237. As explained in point three above, the Department did not invoke its statutory authority at the time it promulgated the regulation. That is the determinative point under *Mead* and it cannot be altered by subsequent agency assertion. Scholars have described *Mead*'s second prong as follows: "in *Mead* the Court made clear that it is only when the agency *actually employs* its delegated authority to make a legal determination that it will be accorded *Chevron* deference." Reese, *Bursting the Chevron Bubble: Clarifying the Scope of Judicial Review in Troubled Times*, 73 FORDHAM L. REV. 1103, 1196 (2004) (emphasis added). *See also id.* at 1164. Indeed, even prior to *Mead*, scholars of administrative law agreed:

> When an agency has a choice to proceed legislatively or nonlegislatively, its *contemporaneous* description is the most reliable test of what it actually did. . . . [I]t is appropriate to accept the agency's description of which alternative it chose *at the time it made the choice.* Deference to the agency's label also promotes certainty and predictability of result and provides agencies with rea-

> sonable assurance that reviewing courts will honor their decision to proceed nonlegislatively.

Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 389 (emphasis added). In contrast, "[s]ubsequent characterization" of a regulation as legislative or interpretive should not be accorded deference. *Id.* at 390 n. 40. *See also Levesque v. Block*, 723 F.2d 175, 181 (1st Cir. 1983) ("agency's contemporaneous characterization of its action" is "highly relevant," but it would be "both unfair and disingenuous to allow the Secretary to say later that he didn't mean it. . . . [W]e are inclined to give little weight to an agency's *post hoc* reconstruction of its efforts and intentions.")

Fifth, the brief argument presented in the Policy Memorandum on the classification issue is unpersuasive as demonstrated by the fact that it is *not* the one presented by the United States in its Brief. *Compare* Brief for the United States at 16a-17a *with id.* at 10-13.

The promulgation of the Policy Memorandum also will not alter the Court of Appeals' analysis because the arguments it contains were already presented to the Court in a form entitled to no less deference. In its brief in the Court of Appeals, the Department argued that the regulation was entitled to deference under *Chevron*, *see* 64a-66a, and was consistent with the Fair Labor Standards Act, *see* 70a-73a. The Department expressly argued that "[l]ike section 552.6, section 552.109(a) serves to 'define and delimit' the terms of the 'companionship services' exemption under Congress' express delegation of authority." 66a. This Court held in *Auer*, 519 U.S. at 462, that the Department's construction of its own regulations, even "in the form of a legal brief," are entitled to deference. In fact, the Solicitor General argues that "the court of appeals should have deferred to DOL's construction of the regulations as set forth in the agency's amicus brief." Brief for the United States at 19 n. 8. But the Court of Appeals did appropriately and expressly consider the Department's position on these issues, specifically

whether the regulation was legal or interpretive—it simply rejected it. 23a-24a. The mere fact that the Department has now placed its arguments into a policy memorandum will not alter the Court of Appeals' decision.

The Policy Memorandum is nothing but a brief in a different form. It is not a regulation. It was not adopted pursuant to notice and comment rule-making. In fact, it states expressly that it is intended only for internal guidance: "to advise staff how to apply the Section 13(a)(15) companionship services exemption in light of the Second Circuit's decision in [this case.]" Brief for the United States at 1a. It presents arguments that could have been and were made by the Department in its brief and argument to the Court of Appeals. The arguments set forth in the Policy Memorandum are entitled to no more deference than the arguments already presented by the Department to the Court of Appeals. It is no exaggeration to state that the Solicitor General asks this Court to take the extraordinary step of summarily vacating the decision of the Court of Appeals based solely on the fact that the government has placed its argument in the form of an advisory memorandum.[2] The promulgation of the Policy Memorandum does not create a new circumstance justifying summarily vacating the Court of Appeals' decision and remanding for reconsideration.

II. EVEN IF THE POLICY MEMORANDUM ALTERS THE COURT OF APPEALS' ANALYSIS OF WHETHER TO ACCORD *CHEVRON* DEFERENCE, THE COURT WILL REACH THE SAME RESULT

Even if the promulgation of the Policy Memorandum were likely to alter the Court of Appeals' analysis of whether the

---

[2] If the government's argument succeeds in this case, it could take the same tack in any case coming to this Court in a similar posture and, thereby, obtain two arguments in the court of appeals.

regulation is entitled to *Chevron* deference, the Court would reach the same result because, as we explained in our original Brief in Opposition, (1) even if the Court of Appeals' classified the regulation as a legal regulation, it would hold it invalid pursuant to the Administrative Procedure Act under binding Second Circuit precedent as strongly suggested in its opinion, *see* 24a-25a; *see also* Brief in Opposition at 26-27, and (2) even if the Court of Appeals accorded the regulation *Chevron* deference, the Court would hold the regulation invalid as inconsistent with the statute, *see* Brief in Opposition at 19-26. Therefore, this Court should not summarily reverse and remand because doing so will not change the relative rights of the parties in any concrete fashion. *See* Robert L. Stern et al., *Supreme Court Practice* 231 (8th ed. 2002).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL SHEN
225 Broadway
Suite 2515
New York, NY 10007
(212) 227-0300

HAROLD CRAIG BECKER *
25 E. Washington
Suite 1400
Chicago, IL 60602
(312) 236-4584

CONSTANTINE P. KOKKORIS
225 Broadway
Suite 612
New York, NY 10007
(212) 349-9340

Counsel for Respondent

* Counsel of Record

Supreme Court, U.S.
FILED
MAY 10 2005
OFFICE OF THE CLERK

No. 04-1315

IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD. and MARYANN OSBORNE,

Petitioners,

—v.—

EVELYN COKE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

DANIEL S. ALTER, ESQ.*
C/O ALTER & ALTER
300 East 42nd Street, 10th Floor
New York, New York 10017
(212) 867-7777

Counsel for Petitioners

*Counsel of Record

PETITIONERS' REPLY MEMORANDUM

Contrary to Respondent's suggestion, this case does not involve the "unwillingness" of elderly and disabled people "to pay more" for home health care services. (Brief in Opp. at 5). Nor do the ramifications of the Second Circuit's holding boil down to Respondent's simplistic characterization—*i.e.*, that the invalidation of 29 C.F.R. § 552.109(a) ("§ 552.109(a)") just makes it "more expensive for employers of unskilled workers providing a range of domestic and personal services to elderly and disabled people in their homes to comply with the minimum labor standards Congress established in the FLSA." (Brief in Opp. at 2). Rather, the decision below threatens a sizeable, frail, and vulnerable population that is financially *unable* "to pay more" for homecare and nullifies the Department of Labor's regulatory effort to make these crucial services available to those in need within the constraints of fairness and limited public funding.

In 1974, Congress specifically authorized the Secretary of Labor to take such measures by exempting from federal minimum wage and overtime pay requirements "*any* employee . . . employed in domestic service employment to provide companionship services" to the aged and infirm. 29 U.S.C. § 213(a)(15) (emphasis added). Following its initial promulgation in 1975 by notice-and-comment rulemaking, and having been reconsidered by the Department of Labor as recently as 2002, § 552.109(a) has guided the home health sector for more than thirty years. Nevertheless, without any factual support, and based only upon its own speculation on policy matters, the court of appeals mistakenly cast aside this time-tested regulation. In so doing, the Second Circuit has jeopardized the health care and livelihoods of scores of thousands of people in this geographic region, and possibly many more elsewhere. Given its dangerous and

broad-scale implications, this Court should review the Second Circuit's ruling.

Respondent opposes *certiorari* by systematically distorting the issues presented in this case for consideration. For example, Respondent erroneously suggests that the Medicaid program will readily absorb the staggering increase in costs imposed on governmental, non-profit, and private agencies by the invalidation of § 552.109(a). (Brief in Opp. at 6-7). Although this assertion is plainly wrong,[1] Petitioners must await the opportunity for merits briefing in order to refute it. Petitioners must likewise wait to correct many of Respondent's numerous other inaccurate statements.

But Respondent's Brief in Opposition makes two new problematic claims that warrant correction now. To start, Respondent tries to dismiss the severity of the Second Circuit's decision by attacking—for the first time—the reliability of sworn statements submitted by several home health care experts and the City of New York in support of Petitioners' motion to stay the Second Circuit's mandate. (Brief in Opp. at 3). In opposing that motion, Respondent submitted *no* evidence to the court of appeals challenging these declarations, although she had the opportunity to do so. Furthermore, the court of appeals must have found these submissions both credible and persuasive, given that the court *granted* Petitioners' motion to stay the mandate over Respondent's objection. (33a-35a).

Even more troubling, though, is Respondent's misleading suggestion that the Department of Labor has,

---

[1] *See, e.g.*, Brief of National Association for Home Care & Hospice, Inc., as *Amicus Curiae* in Support of Petition for Writ of Certiorari, Dkt. No. 04-1315 (April 29, 2005), at 2-4 (discussing inability of Medicare and Medicaid programs to compensate for costs imposed on home health care sector by invalidation of § 552.109(a)).

itself, concluded that withdrawing § 552.109(a) would not have a significant economic impact on affected parties. (Brief in Opp. at 3 n.1). For this proposition, Respondent relies on a preliminary statement issued by the Department of Labor at the outset of a notice-and-comment rulemaking process, commenced in January 2001, in order to determine whether the agency should amend § 552.109(a). But Respondent notably omits the explanation that the agency provided when it *abandoned* the proposed amendment in April 2002. After evaluating the rulemaking record, the Department of Labor reported that "numerous commenters on the proposed rule, including multiple federal agencies . . . seriously called into question the Department's conclusion that there would be little economic impact" from retracting the regulation. 67 Fed. Reg. 16,688 (April 8, 2002). Hence, the agency's most recent statements support rather than undermine Petitioners' concern that the loss of § 552.109(a) will have profound, adverse consequences for the home health care community.[2]

Respondent also argues that that second question presented in the *certiorari* petition—whether the court of

---

[2] Moreover, it is unlikely that the City of New York, all 62 counties comprising the State of New York, and numerous regional and national associations of governmental, non-profit, and private home health care providers would so strongly urge this Court to grant *certiorari* if the consequences of the Second Circuit's ruling were truly insignificant. *See* Brief of *Amici Curiae* City of New York and New York State Association of Counties in Support of Petition for a Writ of Certiorari, Dkt. No. 04-1315 (Aril 29, 2005); Brief of National Association for Home Care & Hospice, Inc. as *Amicus Curiae* in Support of Petition for Writ of Certiorari, Dkt. No. 04-1315 (April 29, 2005); Brief of *Amicus Curiae* Home Care Association of New York State, Inc., Dkt. No. 04-1315 (April 29, 2005); Brief of *Amicus Curiae* Continuing Care Leadership Coalition, Inc. in Support of Petitioner, Dkt. No. 04-1315 (April 29, 2005); Brief of *Amicus Curiae* Home Care Council of New York City, Inc. in Support of Petitioners, Dkt. No. 04-1315 (April 29, 2005).

appeals incorrectly struck § 552.109(a) under *Skidmore* without ever permitting Petitioners to submit evidence in support of the regulation's persuasiveness—is procedurally improper. (Brief in Opp. at 27). Respondent maintains that this issue should not be considered by the Court because "it was Petitioners who moved for judgment on the pleadings" and because "Petitioners made no attempt to introduce the evidence they now say is necessary despite knowing the validity of the regulation was at issue." (*Id.*). This argument is meritless. It ignores both the procedural posture of the case and the correct parameters of a motion for judgment on the pleadings.

Respondent conceded in the district court that she could not win her case against Petitioners if § 552.109(a) were valid and enforceable. (5a, 53a). Applying *Chevron*, the district court upheld § 552.109(a) and therefore granted Petitioners judgment on the pleadings. (53a). The district court never conducted a *Skidmore* analysis with regard to § 552.109(a), and had no opportunity to consider evidentiary matter outside the pleadings.

Thus, Petitioners were not required to raise a procedural argument on appeal regarding a *Skidmore* claim.[3] Nor did they waive their basic right to present evidence at some later stage in the proceeding simply because they did not assert that right while defending a favorable judgment *on the pleadings*. By definition, a motion for judgment on the pleadings cannot rest on extraneous materials without the trial court first converting the motion into one for summary judgment and then giving

---

[3] Respondent repeatedly states that Petitioners did not file a brief in the court of appeals. (Brief in Opp. at 27). These statements are wrong. Petitioners did submit a brief to the Second Circuit, albeit, because of financial constraints, it was a copy of their district court brief.

all parties the chance to submit necessary evidence. *See* Fed. R. Civ. P. 12(c). No such conversion took place here.

Consequently, even assuming that the district court erroneously granted judgment to Petitioners by affording § 552.109(a) *Chevron* deference, Petitioners were still entitled to pursue *Skidmore* deference on remand. By precipitously invalidating § 552.109(a) without permitting the submission of a factual record, however, the court of appeals deprived Petitioners of the opportunity to present "sources of weight" that lend substantial merit to the regulation's validity. *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001). Respondent's invocation of a waiver theory in order to shield this critical misstep from scrutiny is entirely frivolous.

CONCLUSION

For the reasons stated above, and for the reasons stated in the petition for a writ of certiorari, this Court should grant the petition and review of the judgment of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
May 9, 2005

Respectfully submitted,

DANIEL S. ALTER, ESQ.*
c/o ALTER & ALTER
300 East 42nd Street, 10th Floor
New York, New York 10017
(212) 867-7777

Counsel for Petitioners

*Counsel of Record

Supreme Court, U.S.
FILED
DEC 22 2005
OFFICE OF THE CLERK

9

No. 04-1315

In the Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD., ET AL.,
PETITIONERS

v.

EVELYN COKE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

HOWARD M. RADZELY
Solicitor of Labor
GREGORY F. JACOB
Deputy Solicitor
NATHANIEL I. SPILLER
Assistant Deputy Solicitor
EDWARD D. SIEGER
Attorney
Department of Labor
Washington, D.C. 20210

PAUL D. CLEMENT
Solicitor General
Counsel of Record
THOMAS G. HUNGAR
Deputy Solicitor General
DAVID B. SALMONS
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in holding that a Fair Labor Standards Act regulation, 29 C.F.R. 552.109(a), issued by the Department of Labor pursuant to delegated rulemaking authority and after notice and comment, was not entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and was not enforceable.

TABLE OF CONTENTS

Page

Statement 1
Discussion 8
A. The court of appeals' decision is inconsistent with this court's precedents, the text and purposes of the FLSA, and the Tenth Circuit's decision in *Johnston* 10
B. The Court should grant the petition, vacate the decision below, and remand to permit the court of appeals to reconsider its decision in light of DOL's recent guidance making clear that Section 552.109(a) is an exercise of legislative rulemaking authority 17
C. The second question presented by the petition does not warrant further review 19
Conclusion 20
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Auer v. *Robbins*, 519 U.S. 452 (1997) 9, 11, 12, 18, 19
Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) 18
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), ... 6, 8
Christensen v. *Harris County*, 529 U.S. 576 (2000) 12
Chrysler Corp. v. *Brown*, 441 U.S. 281 (1979) 12
Johnston v. *Volunteers of Am., Inc.*, 213 F.3d 559 (10th Cir. 2000), cert. denied, 531 U.S. 1072 (2001) 6, 9, 15

Cases—Continued: Page

National Cable & Telecomm. Ass'n v. *Brand X Internet Servs.*, 125 S. Ct. 2688 (2005) 11
Olmstead v. *L.C. ex rel. Zimring*, 527 U.S. 581 (1999) ... 17
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 10
Stinson v. *United States*, 508 U.S. 36 (1993) 18
Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994) 18
United States v. *Gonzales*, 520 U.S. 1 (1997) 13
United States v. *Mead Corp.*, 533 U.S. 218 (2001) 7, 9, 10, 15
Welding v. *Bios Corp.*, 353 F.3d 1214 (10th Cir. 2004) ... 15
White v. *Shalala*, 7 F.3d 296 (2d Cir. 1993) 9

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:
5 U.S.C. 553 3
5 U.S.C. 553(b)(3) 13
Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et. seq.* ..... *passim*
§ 3(s)(1), 29 U.S.C. 203(s)(1) (1970) 15
§ 3(s)(1)(A)(ii), 29 U.S.C. 203(s)(1)(A)(ii) 15
§ 6, 29 U.S.C. 206 5
§ 7, 29 U.S.C. 207 5
§ 13, 29 U.S.C. 213 6
§ 13(a)(1), 29 U.S.C. 213(a)(1) 11
§ 13(a)(3), 29 U.S.C. 213(a)(3) 13

Statutes and regulations—Continued: Page

§ 13(a)(15), 29 U.S.C. 213(a)(15) 2, 8, 11, 13, 18
§ 13(b)(3), 29 U.S.C. 213(b)(3) 14
Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 ..... 1, 2, 3, 4, 6, 7, 11, 14
§ 29(b), 88 Stat. 76 ..... 2, 11
29 C.F.R.:
Pt. 541 12
Section 541.118(a) (1996) 12
Pt. 552 ..... 2, 13
Sections 552.1-552.7 (Subpt. A) 3
Section 552.2(c) 6
Section 552.3 ..... 3, 7, 15, 18
Section 552.6 ..... 3, 6, 11
Sections 552.99-552.110 (Subpt. B) 3, 6
Section 552.101 ..... 3, 18
Section 552.109 18
Section 552.109(a) ..... *passim*
Exec. Order No. 13217, 3 C.F.R. 774 (2002) 16

Miscellaneous:

Application of Section 13(a)(15) to Third Party Employers, Wage and Hour Advisory Memorandum No. 2005-1 (Dec. 1, 2005) .. 7, 17, 18, 19, 1a
119 Cong. Rec. (1973):
p. 24,797 14
p. 24,798 14
p. 24,801 14

Miscellaneous—Continued: Page

39 Fed. Reg. (1974):
p. 35,382 ..... 3, 11
pp. 35,383 - 38,385 13
p. 35,385 ..... 3, 13, 15
40 Fed. Reg.(1975) :
p. 7404 ..... 3, 11
p. 7405 ..... 3, 4, 11, 15
58 Fed. Reg. (1993):
p. 69,310 4
p. 69,312 4
60 Fed. Reg. (1995):
pp. 46,787-46,798 4
p. 46,798 4
66 Fed. Reg. (2001):
p. 5481 4
p. 5483 16
p. 5485 ..... 4, 5
pp. 5485-5486 5
p. 5486 17
p. 5488 4
67 Fed. Reg. 16,668 (2002) 5, 17
69 Fed. Reg. (2004):
p. 22,122 12
p. 22,126 12
Op. Ltr. FLSA2005-12, 2005 WL 2086801
(Dep't of Labor Mar. 17, 2005) 7, 17

In the Supreme Court of the United States

No. 04-1315

LONG ISLAND CARE AT HOME, LTD., ET AL.,
PETITIONERS

v.

EVELYN COKE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, generally requires covered employers to pay a minimum wage and, for work hours that exceed 40 hours in a work week, one and one-half times an employee's regular rate of pay. Fair Labor Standards Amendments of 1974 (1974 Amendments), Pub. L. No. 93-259, 88 Stat. 55, generally extend those requirements to "domestic service" employees, but specifically exempt such employees providing "companionship services" to the elderly or infirm. That exemption applies to:

> any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to

> care for themselves (as such terms are defined and delimited in the regulations of the Secretary).

29 U.S.C. 213(a)(15). Congress did not define either "domestic service employment" or "companionship services" in the Act, but instead authorized the Secretary of Labor "to prescribe necessary rules, regulations, and orders" regarding the 1974 Amendments. § 29(b), 88 Stat. 76.

Pursuant to that authority, the Department of Labor (DOL) promulgated regulations exempting domestic service employees who provide companionship services from the minimum wage and overtime requirements of the FLSA. 29 C.F.R. Pt. 552. First adopted in February 1975, those regulations make clear that domestic service employees providing companionship services are exempt from the FLSA's minimum-wage and overtime-pay requirements, even when they are employed by a third-party employer. Section 552.109(a) of the regulations provides:

> Employees who are engaged in providing companionship services, as defined in [29 C.F.R.] § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15) [of the FLSA].

29 C.F.R. 552.109(a).[1]

---

[1] "Companionship services" are defined, in relevant part, as:

> those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs.

The regulations at issue, including Section 552.109(a), were issued after DOL undertook notice-and-comment rulemaking in accordance with the Administrative Procedure Act (APA), 5 U.S.C. 553. Initially, DOL proposed that employees who provide companionship services and are employed by third parties would fall outside the scope of the companionship exemption, on the ground that some third-party employment was covered by the FLSA before the 1974 Amendments. See 39 Fed. Reg. 35,382, 35,385 (1974).

After receiving and considering comments on the proposed rule, however, DOL decided that third-party employment should be included within the scope of the companionship exemption. See 40 Fed. Reg. 7404, 7405 (1975). DOL acknowledged that its decision constituted a change from the proposed rule, but explained that, under the plain language of the FLSA, the "exemptions

---

29 C.F.R. 552.6. The regulations also state that "domestic service employment":

> refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. It also includes babysitters employed on other than a casual basis. This listing is illustrative and not exhaustive.

29 C.F.R. 552.3; see 29 C.F.R. 552.101 ("The domestic service must be performed in or about the private home of the employer whether that home is a fixed place of abode or a temporary dwelling."). Sections 552.3 and 552.6 are contained in Subpart A of the regulations, designated "General Regulations," whereas Section 552.109(a)'s third-party exemption is contained in Subpart B, designated "Interpretations."

can be available to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services. This interpretation is more consistent with the statutory language and prior practices concerning other similarly worded exemptions." 40 Fed. Reg. at 7405. Thus, the final regulation promulgated to implement the 1974 Amendments expressly applied the companionship services exemption to third-party employers.

In 1993, DOL proposed to limit the companionship exemption substantially by requiring that the person receiving companionship services be the employer or joint employer of the domestic service employee. See 58 Fed. Reg. 69,310, 69,312 (1993). Seven comments on the proposed change were received by DOL, none of which was supportive of the change. See 60 Fed. Reg. 46,797-46,798 (1995).

In 1995, DOL reopened and extended the comment period for the 1993 proposed rule, and revised its proposal to allow the companionship services exemption for third-party employers to apply only to employment by a government agency or family member acting on behalf of an incapacitated elderly or infirm person. 60 Fed. Reg. at 46,798. Again, DOL received very few comments on the proposal, and in 2001 the agency acknowledged that the comments reflected confusion about the impact and effect of the proposal. See 66 Fed. Reg. 5481, 5485 (2001). Accordingly, the third-party employer exemption was not limited.

In the 2001 Federal Register notice, DOL again proposed to amend the regulations, this time by revising the definition of "companionship services" to clarify the focus on the element of "fellowship" and to eliminate the third-party exemption contained in Section 552.109(a). 66 Fed. Reg. at 5485; see *id.* at 5488. In the notice of

proposed rulemaking, DOL recognized that "[u]nder the existing regulation, employees who are employed by an employer or agency other than the family or household using the companionship services may still qualify for the exemption." *Id.* at 5485. The agency expressed the view that "the current regulations contain an internal inconsistency" that would be resolved by the proposed change, and also stated that the proposed new rule would not have a significant economic impact. *Id.* at 5485-5486. In 2002, however, after the comment period closed, DOL withdrew the proposed rule because numerous commenters, including the Small Business Administration (SBA) and the Department of Health and Human Services (HHS), challenged DOL's conclusion that the rule would have little economic impact. See 67 Fed. Reg. 16,668 (2002). Thus, although DOL has periodically considered alternative constructions, the regulation at 29 C.F.R. 552.109(a) has remained unchanged since 1975.

2. Petitioners employ approximately 40 home health care aides, who provide companionship services to approximately 30 homebound patients in New York. Pet. 8; Pet. App. 37a-38a, 79a. Respondent is a former employee of the petitioners, who worked as a home health care attendant. Pet. App. 37a-38a. Respondent brought suit against petitioners under, *inter alia*, Sections 206 and 207 of the FLSA, alleging that despite working more than 40 hours a week, she never received overtime payments and that her hourly wage was less than the minimum wage. Pet. App. 37a-42a.

The district court granted petitioners' motion for judgment on the pleadings and dismissed the case, holding that respondent could not state a claim as a matter of law because home health care workers are exempt

from the minimum wage and overtime requirements under the companionship exemption of the FLSA and its implementing regulations. Pet. App. 52a-53a. The court applied the standard set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), and held that 29 C.F.R. 552.6 and 552.109(a) were not arbitrary, capricious or manifestly contrary to the FLSA. *Id.* at 44a-52a.

3. The court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 1a-30a. As relevant here, the court of appeals rejected DOL's arguments in favor of deference, see Gov't C.A. Br. 12-29, and held that 29 C.F.R. 552.109(a) was not entitled to *Chevron* deference because the agency did not "self-consciously" promulgate the rule in an exercise of congressionally delegated legislative rulemaking authority. Pet. App. 19a-26a. The court acknowledged that the 1974 Amendments expressly delegated authority to DOL to define and delimit the terms of the statute; that the regulation was a long-standing, contemporaneous construction; and that Congress has amended Section 213 of the FLSA seven times since 1974 without expressing disapproval of the agency's interpretation. *Id.* at 20a-21a. In addition, the court recognized that the regulation was the product of notice-and-comment rulemaking, and that all other courts that have considered the issue, including *Johnston* v. *Volunteers of America, Inc.*, 213 F.3d 559 (10th Cir. 2000), cert. denied, 531 U.S. 1072 (2001), have applied *Chevron* deference and upheld the regulation. Pet. App. at 21a. The court concluded, however, that DOL did not intend to use its delegated authority when promulgating 29 C.F.R. 552.109(a) because the regulation is included within Subpart B of Part 552, entitled "Interpretations," and because another regulation at 29

C.F.R. 552.2(c) states that the "definitions required by [29 U.S.C. 213(a)(15)] are contained in § 552.3, § 552.4, § 552.5 and § 552.6." *Id.* at 23a. Relying on *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), the court reasoned that the regulation was therefore "interpretive," as opposed to "legislative," and thus not entitled to *Chevron* deference. Pet. App. at 21a-25a.

The court then concluded that the third party employment regulation at 29 C.F.R. 552.109(a) was unenforceable under the less deferential *Skidmore* standard. In the court's view, the regulation was inconsistent with Congress's likely intent in enacting the 1974 Amendments, inconsistent with Section 552.3's definition of domestic service employment, and the product of inadequate reasoning. Pet. App. 26a-29a.[2]

4. After the court of appeals issued its decision, and after this Court invited the Solicitor General to express the views of the United States on the matter, DOL issued authoritative agency guidance making clear that the promulgation of 29 C.F.R. 552.109(a) was an exercise of DOL's expressly conferred legislative rulemaking authority. See *Application of Section 13(a)(15) to Third Party Employers*, Wage & Hour Advisory Mem. No. 2005-1 (Dec. 1, 2005), App., *infra*, 1a-17a; see also Op. Ltr. FLSA2005-12, 2005 WL 2086801 (Mar. 17, 2005) (indicating that the Wage and Hour Division "has not changed [Section 552.109(a)] or its interpretation thereof as a result" of the Second Circuit's decision in this case). Specifically, the Advisory Memorandum states that "the Department considers the third party employment regulations at 29 C.F.R. 552.109 to be authoritative and legally binding," and that the language

[2] The court of appeals denied a petition for rehearing, but stayed issuance of the mandate. Pet. App. 31a-35a.

of the regulation and its explanatory material "makes it clear that at the time the final rule was promulgated, the Department believed that the availability of the companionship exemption to third party employers turned decisively on its pronouncement in the regulations—something that could be true only of a legislative rule." App., *infra*, 16a-17a. Accordingly, DOL explained, "the Department has always treated the third party employment regulations as legally binding legislative rules, and it will continue to do so on an ongoing basis." *Id.* at 17a. The Advisory Memorandum also explains why Section 552.109(a) represents the best reading of the statutory exemption contained in Section 13(a)(15), and can be reconciled with other regulatory provisions. *Id.* at 2a-16a.

DISCUSSION

The court of appeals held that a longstanding DOL regulation, 29 C.F.R. 552.109(a), promulgated pursuant to the FLSA's express grant of rulemaking authority to the Secretary of Labor, is not entitled to judicial deference and is not enforceable. The primary basis for those rulings was the court's conclusion that, because Section 552.109(a) is contained in a portion of the regulations styled "Subpart B—Interpretations," rather than in "Subpart A—General Regulations," DOL did not intend its promulgation of Section 552.109(a) to be an exercise of the legislative rulemaking authority conferred by Congress. Pet. App. 22a-23a. Instead, the court of appeals concluded, Section 552.109(a) should be viewed merely as an "interpretative" rule not entitled to deference under *Chevron, U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), even though the court acknowledged that Section 552.109(a) "'grants

rights, imposes obligations, or produces other significant effects on private interests,' as legislative regulations do." Pet. App. 22a-23a (quoting *White* v. *Shalala*, 7 F.3d 296, 303 (2d Cir. 1993)).

Those holdings of the court of appeals are inconsistent with this Court's decisions, most notably *Auer* v. *Robbins*, 519 U.S. 452 (1997), and *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), and with the Tenth Circuit's decision in *Johnston* v. *Volunteers of America, Inc.*, 213 F.3d 559, 562 (2000), cert. denied, 531 U.S. 1072 (2001), which expressly held that Section 552.109(a) is entitled to *Chevron* deference. The decision below is also inconsistent with the plain terms of the FLSA, which strongly support the construction adopted by DOL in Section 552.109(a). As the amicus briefs filed in support of the petition attest, moreover, the decision below will have a significant and disruptive impact on the provision of government-funded home care to elderly and disabled individuals.

For those reasons, and because of the important and recurring nature of the questions raised in this case, it would be appropriate for this Court to grant the petition for a writ of certiorari to review the first question presented in the petition. The court of appeals' errors, however, were caused primarily by its mistaken conclusion, based on the structure of the regulations, that DOL did not intend Section 552.109(a) to be an exercise of its delegated legislative rulemaking authority. Because DOL has now made clear—in an authoritative agency guidance issued after the court of appeals' decision—that it has always intended, and still intends, Section 552.109(a) to be an exercise of its expressly delegated legislative authority, see App., *infra*, 1a-17a, the better course would be for this Court to grant the petition for a writ of

certiorari, vacate the judgment below, and remand for further proceedings to allow the court of appeals to reconsider its holdings in light of DOL's authoritative interpretation of its own regulations.

Petitioners also raise a second question presented in the petition: Whether the court of appeals should have permitted further factual development before deciding whether Section 552.109(a) is entitled to *Skidmore* deference. That question is largely case-specific, is not the subject of a conflict among the courts of appeals, and is not implicated under the correct legal principles applicable to this case, which entitle the regulation to *Chevron*, not *Skidmore*, deference. Accordingly, it does not warrant this Court's review.

A. The Court of Appeals' Decision Is Inconsistent With This Court's Precedents, The Text And Purposes Of The FLSA, And The Tenth Circuit's Decision In *Johnston*

1. The court of appeals erred in refusing to give *Chevron* deference to the authoritative interpretation set forth in 29 C.F.R. 552.109(a), and in invalidating that regulation under the minimal level of deference afforded by *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). In *Mead*, this Court "consider[ed] the limits of *Chevron* deference" and held "that administrative implementation of a particular statutory provision qualifies for *Chevron* deference" when two conditions are satisfied: (1) that "Congress delegated authority to the agency generally to make rules carrying the force of law," and (2) that "the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226-227. Section 552.109(a) satisfies both of those conditions.

Congress delegated to the Secretary of Labor the authority to "define[] and delimit[] by regulation" the terms of the companionship exemption to the FLSA's minimum wage and overtime requirements. 29 U.S.C. 213(a)(15). Regulations issued under that authority are entitled to *Chevron* deference, just as regulations promulgated under the Secretary's similar authority to "define[] and delimit[]" the FLSA's exemption in 29 U.S.C. 213(a)(1) for employees employed in an executive, administrative, or professional capacity were held to be entitled to *Chevron* deference by this Court in *Auer*, 519 U.S. at 457-458. Congress also delegated to the Secretary the authority "to prescribe necessary rules, regulations, and orders" regarding the 1974 Amendments, which expanded the FLSA's coverage to include persons in domestic service and added 29 U.S.C. 213(a)(15). 1974 Amendments, § 29(b), 88 Stat. 76. That provision confers additional authority to promulgate binding legal rules. See, *e.g.*, *National Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005). DOL expressly relied on both sources of authority when it promulgated the proposed and final regulations that included Section 552.109(a). See 40 Fed. Reg. 7404, 7405 (1975); 39 Fed. Reg. 35,382 (1974). Accordingly, Section 552.109(a) is entitled to the same *Chevron* deference that the court below properly gave to the related "companionship services" regulation, 29 C.F.R. 552.6. See Pet. App. 13a-19a.

The court of appeals reasoned (Pet. App. 22a-23a) that the placement of Section 552.109(a) in a subpart of the regulations entitled "Interpretations" renders *Chevron* inapplicable, because it reveals that DOL "did not intend to use the legislative power delegated in § 213(a)(15) when it promulgated § 552.109(a)." Pet.

App. 23a. That reasoning conflicts with this Court's decision in *Auer*. In that case, the Court afforded *Chevron* deference to a DOL regulation that is indistinguishable for *Chevron* purposes from Section 552.109(a). The regulation at issue in *Auer* (like the regulation at issue here) was promulgated by DOL pursuant to rulemaking authority conferred by the FLSA, was the product of notice-and-comment procedures, and was set out in a portion of the regulations styled "Subpart B—Interpretations," rather than in "Subpart A—General Regulations." See 519 U.S. at 456-458; 29 C.F.R. 541.118(a) (1996).[3] The Second Circuit's refusal to give *Chevron* deference to Section 552.109(a) is therefore directly at odds with *Auer*.

More generally, the court of appeals' reliance on the "Interpretations" label is inconsistent with the fundamental principle that "the framework of deference set forth in *Chevron* does apply to an agency *interpretation* contained in a regulation." *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000) (emphasis added). The mere fact that a regulation "interprets" a statutory provision provides no basis for deeming it a non-binding "interpretative" rule, particularly when, as here, the agency has express statutory authority to promulgate the regulation and employs notice-and-comment rulemaking procedures in doing so. A far more relevant "touchstone" is whether the regulation is "one 'affecting individual rights and obligations.'" *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 (1979). And as the court of appeals acknowledged, Section 552.109(a) unquestion-

[3] DOL has since amended the Part 541 regulations, and the current regulations are not divided into "General Regulations" and "Interpretations" subparts. See 69 Fed. Reg. 22,122, 22,126 (2004) (codified at 29 C.F.R. Pt. 541).

ably falls into that category. See Pet. App. 22a ("[T]he rule 'grants rights, imposes obligations, or produces other significant effects on private interests,' as legislative regulations do.") (citation omitted).[4]

2. The court of appeals' decision also ignores the language of the FLSA to which DOL's construction gives full effect. The companionship exemption applies to "any employee employed in domestic service employment to provide companionship services." 29 U.S.C. 213(a)(15). Congress's use of the term "any" is naturally read to include all employees providing such services, regardless of who employs them. See, *e.g.*, *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (citation omitted). Presumably, if Congress had wanted to limit the exemption to employees who were employed by a particular employer or industry, it would have said so expressly, as it has done with other FLSA exemptions. See, *e.g.*, 29 U.S.C. 213(a)(3) (exemption for "any em-

---

[4] Respondent argues (Br. in Opp. 26-27) that if Section 552.109(a) is not interpretive, it is invalid because the Department did not comply with the APA's notice-and-comment requirements because DOL deviated in the final rule from the approach initially proposed. That argument is not properly before the Court because it was untimely raised, Pet. App. 43a n.3, and the court of appeals did not decide the issue, *id.* at 24a. The argument is also meritless. The APA requires an agency's notice of proposed rulemaking to include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. 553(b)(3). The Department's notice set forth the terms of the proposed Part 552 (39 Fed. Reg. at 35,383-38,385), including a proposed provision directed specifically to the subject of third-party employment (*id.* at 35,385), and thereby complied with 5 U.S.C. 553(b)(3).

ployee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center"); 29 U.S.C. 213(b)(3) ("any employee of a carrier by air"). Instead, the statutory language focuses on *employee activities* rather than the identity of the employer, and uses broadly inclusive language to capture all such activities.

Contrary to the court of appeals' conclusion (Pet. App. 26a-27a), applying the companionship exemption to employees of third parties is also fully consistent with Congress's purposes. As the district court recognized, the companionship services exemption is intended "to allow those in need of such services to find such assistance at a price they can afford." *Id.* at 52a. In particular, legislators were concerned that working people could not afford to pay for companionship services if they had to pay FLSA wages. See 119 Cong. Rec. 24,797 (1973) (statement of Sen. Dominick, discussing letter from Hilda R. Poppell); *id.* at 24,798 (statement of Sen. Johnston); *id.* at 24,801 (statement of Sen. Burdick). That cost concern applies whether the companionship services are "provided by the direct hiring of an employee or through the use of an agency." Pet. App. 52a. Applying the exemption to all employees who provide companionship services is, therefore, fully consistent with congressional purposes.[5]

---

[5] The court of appeals speculated (Pet. App. 26a-27a) that Congress would not have wanted to exempt the employees of third parties because, in the court's view, those employees were covered by the FLSA before the 1974 Amendments, which added the companionship exemption and generally were intended to expand coverage rather than to eliminate it. Contrary to the court of appeals' understanding, however, not all employees providing companionship services who worked for a

3. In addition, the Second Circuit's invalidation of 29 C.F.R. 552.109(a) conflicts with the Tenth Circuit's decision in *Johnston* and, if left undisturbed, will have a substantial impact on the home care industry. In *Johnston*, the Tenth Circuit applied *Chevron* and upheld the regulation, despite employee arguments that the regulation was "an interpretation which does not have the effect of law" and was limited by 29 C.F.R. 552.3. 213 F.3d at 561. That result conflicts with the decision below, which refused to give *Chevron* deference to 29 C.F.R. 552.109(a) and invalidated the regulation. Despite respondent's description of the ruling as "*dicta*" (Br. in Opp. 8), the *Johnston* court characterized its own decision as a holding, 213 F.3d at 562. It is also irrelevant that the court issued its decision before *Mead* was decided, see Br. in Opp. 8; Pet. App. 21a-22a. Nothing in *Mead* eliminates *Chevron* deference for agency regulations issued under express rulemaking authority like that involved here, see *Mead*, 533 U.S. at 230 n.12, and the Tenth Circuit has adhered to *Johnston* after *Mead* was decided, see *Welding* v. *Bios Corp.*, 353 F.3d 1214, 1217 n.3 (10th Cir. 2004).

---

third party were covered by the FLSA before 1974. Rather, the Act applied only "if the third party employer is a covered enterprise meeting the tests of sections 3(r) and 3(s)(1) of the Act." 39 Fed. Reg. at 35,385; see 29 U.S.C. 203(s)(1)(A)(ii) (enterprise coverage currently requires $500,000 in sales or revenue); 29 U.S.C. 203(s)(1) (1970) (at time of 1974 FLSA amendments, $250,000 was required). There is no reason to assume that when Congress extended FLSA coverage to domestic employment in 1974 it intended to deny the companionship exemption to newly covered third-party providers. Instead, as the Department explained in promulgating 29 C.F.R. 552.109(a), construing the exemption to cover all employees who provide companionship services "is more consistent with the statutory language and prior practices concerning other similarly worded exemptions." 40 Fed. Reg. at 7405.

The court of appeals' invalidation of Section 552.109(a) will have a substantial impact on the home care industry and could cause serious disruption in the care that frail elderly and disabled individuals currently receive. New York City, for example, estimates that the court of appeals' decision will add $279 million a year to its costs of providing personal care services to 50,000 low income frail elderly and disabled individuals through 60,000 personal care attendants, and that it is unclear whether state and federal funding will be available to cover those increased costs. City of New York et al. Amici Br. 2, 5-8. Other home care providers similarly argue that they have limited resources and that the court's decision will increase their costs of labor beyond the point at which they have the ability to pay for them. Home Care Ass'n of New York State, Inc. (HCA) Amicus Br. 2, 15-19; Continuing Care Leadership Coalition, Inc. (CCLC) Amicus Br. 2, 9-10; National Ass'n of Home Care & Hospice Inc. Amicus Br. 2-4; Home Care Council of New York City, Inc. Amicus Br. 6-9. The federal government, which pays much of the cost of providing home care services through Medicare and Medicaid, 66 Fed. Reg. 5483 (2001), may also be adversely affected by the court's decision. All this could lead to less care and reduced continuity in care for the elderly and the infirm, and ultimately to more institutionalization, see CCLC Amici Br. 7; HCA Amicus Br. 8-9, a result contrary to federal government policy, see Exec. Order 13,217, 3 C.F.R. 774 (2002) (individuals with disabilities should be placed in community settings whenever possible);

Olmstead v. *L.C. ex rel. Zimring*, 527 U.S. 581, 587 (1999).[6]

B. The Court Should Grant The Petition, Vacate The Decision Below, And Remand To Permit The Court Of Appeals To Reconsider Its Decision In Light Of DOL's Recent Guidance Making Clear That Section 552.109(a) Is An Exercise Of Legislative Rulemaking Authority

DOL recently issued authoritative agency guidance that makes clear that DOL has always intended, and still intends, Section 552.109(a) to be an exercise of its expressly delegated legislative rulemaking authority. *Application of Section 13(a)(15) to Third Party Employers*, Wage & Hour Advisory Mem. No. 2005-1 (Dec. 1, 2005), App., *infra*, 1a-17a; see Op. Ltr. FLSA2005-12, 2005 WL 2086801 (Mar. 17, 2005) (indicating that the Wage and Hour Division "has not changed [Section 552.109(a)] or its interpretation thereof as a result" of the decision below). The Advisory Memorandum states that "the Department considers the third party employment regulations at 29 C.F.R. 552.109 to be authoritative and legally binding," and that the language of the regulation and its explanatory material "makes it clear that at the time the final rule was promulgated, the Department believed that the availability of the companionship exemption to third party employers turned decisively on its pronouncement in the regulations—something that could be true only of a legislative rule."

[6] Respondent mistakenly relies on the Department's statement in January 2001 that proposed revisions to 29 C.F.R. 552.109(a) would not have a significant economic or budgetary impact on affected entities. Br. in Opp. 3 n.1; see 66 Fed. Reg. at 5486. The Department did not make the proposed revisions because numerous commenters, including multiple government agencies, "seriously called into question [that] conclusion." 67 Fed. Reg. 16,668 (2002).

App. *infra*, 16a-17a. DOL has therefore "always treated the third party employment regulations as legally binding legislative rules, and it will continue to do so on an ongoing basis." *Id.* at 17a.

The Advisory Memorandum also sets forth the reasoning underlying DOL's conclusion that Section 552.109(a) represents the best reading of the statutory exemption contained in 29 U.S.C. 213(a)(15), and explains how the language contained in Section 552.3 and 552.101 of the regulations, which the court of appeals viewed as inconsistent with the third-party exemption of Section 552.109(a) (see Pet. App. 27a-28a), can be harmonized with Section 552.109. App., *infra*, 2a-16a.[7]

The Advisory Memorandum represents DOL's controlling interpretation of its own regulations, and is therefore entitled to a high degree of deference. An agency interpretation of its own regulation "must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Stinson* v. *United States*, 508 U.S. 36, 45 (1993) (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)); *Auer*, 519 U.S. at 462; *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994).

As indicated above, the principal basis for the court of appeals' holding that Section 552.109(a) is not entitled to *Chevron* deference is its mistaken conclusion that

[7] The Advisory Memorandum explains that DOL views the definitions of "domestic service employment" in Sections 552.3 and 552.101 as pertaining to the types of employment and services covered by the exemption, and not as imposing a limitation based on the identity of the employer. App., *infra*, 5a-9a. "The references in those provisions to domestic service employment needing to be performed in the home of the employer are not intended to address the issue of third party employment, but rather are an extraneous vestige of the language's origin in the Social Security regulations." *Id.* at 9a.

"DOL did not intend to use the legislative power delegated in § 213(a)(15) when it promulgated § 552.109(a)." Pet. App. 23a. In the court's view, "§ 552.109(a) does not qualify for *Chevron* deference because, by DOL's own account, it was self-consciously not promulgated in exercise of Congress's delegated authority pursuant to § 213(a)(15)." *Ibid.* The Advisory Memorandum now makes clear that this central premise of the court of appeals' decision is erroneous—that DOL "has always treated the third party employment regulations as legally binding legislative rules, and it will continue to do so on an ongoing basis." App., *infra*, 17a. Accordingly, the Court should grant the petition for a writ of certiorari, vacate the judgment below, and remand for further proceedings to allow the court of appeals to reconsider its holdings in light of DOL's authoritative construction of its own regulations.[8]

C. The Second Question Presented By The Petition Does Not Warrant Further Review

With regard to the second question presented in the petition, petitioners argue that, even if Section 552.109(a) does not receive *Chevron* deference, the court should have allowed full development of a factual record before deciding that the regulation was not entitled to *Skidmore* deference. Pet. i, 13, 23-26. Petitioners have not cited any cases holding that a court can or must look

[8] Although the court of appeals should have deferred to DOL's construction of its regulations as set forth in the agency's amicus brief submitted in the court of appeals, see *Auer*, 519 U.S. at 462; Gov't C.A. Br. 12-15, the Advisory Memorandum represents both a more formal and a more complete explanation of the agency's interpretation of its regulations. An order from this Court granting the petition, vacating the decision, and remanding for reconsideration is therefore appropriate.

beyond the agency's rationale for its rule before engaging in such review. There is, accordingly, no conflict among the courts of appeals on that question. Nor does the case-specific question whether the factual record in this case was adequate to resolve the question of *Skidmore* deference otherwise warrant this Court's review. Indeed, the question of the appropriate factual basis for *Skidmore* deference should not even be reached in this case because, under a proper understanding of the law, the regulation is entitled to deference under *Chevron*, not *Skidmore*.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of DOL's authoritative construction of its own regulations as set forth in the Advisory Memorandum. In the alternative, the petition for a writ of certiorari should be granted, limited to the first question presented in the petition.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
THOMAS G. HUNGAR
Deputy Solicitor General
DAVID B. SALMONS
Assistant to the Solicitor General

HOWARD M. RADZELY
Solicitor of Labor
GREGORY F. JACOB
Deputy Solicitor
NATHANIEL I. SPILLER
Assistant Deputy Solicitor
EDWARD D. SIEGER
Attorney
Department of Labor

DECEMBER 2005

APPENDIX

December 1, 2005

WAGE AND HOUR ADVISORY MEMORANDUM
No. 2005-1

MEMORANDUM FOR:	REGIONAL ADMINISTRATORS - DISTRICT DIRECTORS
FROM:	ALFRED B. ROBINSON, JR. Deputy Administrator
SUBJECT:	Application of Section 13(a)(15) to Third Party Employers

Policy and Interpretation for Applying the Section 13(a)(15) Exemption

The purpose of this memorandum is to advise staff how to apply the Section 13(a)(15) companionship services exemption in light of the Second Circuit's decision in *Coke* v. *Long Island Care at Home*, 376 F.3d 118 (2nd Cir. 2004). As indicated in Opinion Letter FLSA 2005-12, the Division continues to adhere to its regulation, set out at 29 C.F.R. § 552.109(a), exempting companions who are employed by third parties from the minimum wage and overtime requirements of the FLSA. Regional Administrators and District Directors are instructed to continue to apply the exemption in states outside the Second Circuit.

Rationale for Applying the Exemption

The following explains and justifies the Division's policy to continue to apply the section 13(a)(15) exemption in all jurisdictions except those that comprise the Second Circuit Court of Appeals.

The text of the FLSA makes the applicability of the companionship exemption dependent upon the nature of an employee's activities and the place of their performance, without regard to the identity of the employer. Section 13(a)(15) exempts "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)." 29 U.S.C. § 213(a)(15). This language is naturally read to exempt any employee who provides companionship services to an aged or infirm individual in a private home. The statute does not draw any distinction between companions who are employed by the owners of the homes in which they are working and companions who are instead employed by third party employers.

The Department's regulations explicitly state that the companionship exemption applies to companions employed by third party employers. The Department promulgated the Part 552 regulations pursuant to its express statutory authority under section 13(a)(15) to define and delimit the terms of the exemption, as well as its additional authority to issue regulations to implement the 1974 FLSA amendments. 40 Fed. Reg. 7404 (1975); see Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 29(b), 88 Stat. 55, 76 (authority to issue implementing regulations). Section 552.109(a) of Part 522 *[sic]* provides:

> Employees who are engaged in providing companionship services, as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime requirements by virtue of section 13(a)(15).

In promulgating 29 C.F.R. § 552.109(a), the Department explained that applying the exemption to employees of third parties "is more consistent with the statutory language and prior practices concerning other similarly worded exemptions." 40 Fed. Reg. 7404, 7405 (1975). The Department continues to agree with that assessment because the statutory phrase "any employee" indicates that the exemption is naturally read to apply based on the activities of the employee, not identity of the employer. See, *e.g.*, 29 C.F.R. § 780.303 (exemption in 29 U.S.C. § 213(a)(6)(A) for "any employee employed in agriculture" turns on "the activities of the employee rather than those of his employer"); 29 C.F.R. § 780.403 (exemption in 29 U.S.C. § 213(b)(12) for "any employee employed in" certain activities "may not apply to some employees of an employer engaged almost exclusively in activities within the exemption, and it may apply to some employees of an employer engaged almost exclusively in other activities").

Section 552.109(a) is also consistent with the policy objectives that Congress was pursuing in creating the companionship exemption. Soon after the regulations were promulgated, the Department explained that Congress was mindful of the special problems of working fathers and mothers who need a person to care for an elderly invalid in their home. Op. Ltr. WH-368, 1975 WL 40991 (DOL Nov. 25, 1975). In particular, legisla-

tors were concerned that working people could not afford to pay for companionship services if they had to pay FLSA wages. See 119 Cong. Rec. 24,797 (statement of Sen. Dominick, discussing letter from Hilda R. Poppell); *id.* at 24,798 (statement of Sen. Johnston); *id.* at 24,801 (statement of Sen. Burdick). That cost concern applies whether the working person obtains the companionship services by directly hiring an employee or by obtaining the services through a third party.

In *Coke* v. *Long Island, supra*, the Second Circuit ruled that section 552.109(a) of the Department's regulations is inconsistent with congressional intent and with section 552.3 of the regulations. The Department disagrees. As explained above, Congress created the exemption to ensure that working families in need of companionship services would be able to obtain them, a concern that has nothing to do with the source of the companions' employment. Thus, it is unsurprising that the text of the statute focuses exclusively on the nature of the activities that companions perform and does not even hint that the source of a companion's employment is a relevant factor. Presumably, if Congress had wanted to limit the companionship exemption to employees of a particular employer, it would have said so expressly, as it has done with other FLSA exemptions. See, *e.g.*, 29 U.S.C. § 213(a)(3) (exemption for "any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center"); 29 U.S.C. § 213(b)(3) ("any employee of a carrier by air").

Moreover, the congressional committee reports that discuss section 13(a)(15) repeatedly emphasize that the key factors in determining whether an employee quali-

fies for the companionship exemption are the nature of the employee's activities, *see, e.g.*, H.R. Rep. No. 93-913, at 33 (1974) ("The bill exempts . . . employees employed *in the capacity* of companion to an individual who, by reason of age or necessity, necessitates a companion.") (emphasis added); S. Rep. No. 93-690, at 20 (1974) ("It is not, however, the Committee's intent to include within the term 'domestic service' *such activities as* casual babysitting and acting as a companion.") (emphasis added); 119 Cong. Rec. 24,801 (1973) (describing tasks performed by companions) (statements of Sens. Burdick and Williams); H.R. Conf. Rep. No. 93-413, at 27 (1973) (explaining that the kinds of services that are performed by trained personnel such as nurses do not fall within the exemption), and the place that the activities are performed. *See, e.g.*, S. Rep. No. 93-300, at 22 (1973) ("The domestic service must be performed in a private home which is a fixed place of abode of an individual or family"); S. Rep. No. 93-690, *supra*, at 20 (same); 119 Cong. Rec. at 24,799 ("A dwelling used primarily as a boarding or lodging house for the purpose of supplying such services to the public, as a business enterprise, is not a private home.") (statement of Sen. Williams).

The Department's regulations are not only consistent with congressional intent, but they are also internally consistent. The regulations address the issue of third party employment in only one place—section 552.109(a), which clearly and explicitly provides that companions employed by third parties can qualify for the exemption. The Department intentionally chose to include third party employees within the exemption after careful deliberation. When the regulations were first proposed, the Department drafted section

552.109 to exclude companions employed by third party employers from the exemption. 39 Fed. Reg. 35,382, 35,385 (1974). After reviewing the comments it received, however, the Department reconsidered its position. When the regulations were issued in final form, the Department adopted the present language of section 552.109(a), which expressly includes companions employed by third party employers within the exemption. The Department explained that "[o]n further consideration, [it had] concluded that these exemptions can be available to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services. This interpretation is more consistent with the statutory language and prior practices concerning other similarly worded exemptions." 40 Fed. Reg. 7404, 7405 (1975).

The Department's January 19, 2001 NPRM and the Second Circuit's decision in *Coke* v. *Long Island* identified a conflict between section 552.109(a)'s pronouncement that the companionship exemption extends to third party employers and section 552.3's definition of "domestic service employment." *See* 66 Fed. Reg. at 5485; *Coke* v. *Long Island*, 376 F.3d at 133-34. The Department has reviewed section 552.3 and another regulation, 29 C.F.R. 552.101(a), which also addresses the concept of "domestic service employment." The regulations' definition of "domestic service employment" is relevant to determining the scope of the companionship exemption because the text of section 13(a)(15) exempts only those companions who are "employed *in domestic service employment* to provide companionship services." Thus, the statute seems to contemplate that to qualify for the exemption, an employee must *both* "provide companionship services" *and* be "employed in domestic service employment." If the definition of "domestic service

employment" in sections 552.3 and 552.101(a) is properly read as excluding all third party employees, then those provisions can fairly be said to be significantly in tension with section 552.109(a), which expressly includes companions employed by third party employers.

The Department does not believe, however, that sections 552.3 and 552.101(a), when properly read in context, speak to the issue of third party employment. Neither provision explicitly mentions the subject. And unlike section 552.109(a), there is no indication that the Department ever considered the potential impact of the provisions on the coverage of third party employees, much less that it actually intended the provisions to entirely exclude them. To the contrary, at the time the regulations were promulgated the Department seems to have believed that sections 552.3 and 552.101(a) did not resolve the issue of third party employment, since it included a separate section—section 552.109—in both the NPRM and the final rule to expressly address the subject.

Admittedly, there are phrases in sections 552.3 and 552.101(a) that could potentially be read to exclude third party employees from the definition of "domestic service employment." Section 552.3 provides:

> As used in section 13(a)(15) of the Act, the term *domestic service employment* refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. It also includes baby-

> sitters employed on other than a casual basis. This listing is illustrative and not exhaustive.

And section 552.101(a) explains:

> The definition of *domestic service employment* contained in § 552.3 is derived from the regulations issued under the Social Security Act (20 CFR 404.1057) and from the "generally accepted meaning" of the term. Accordingly, the term includes persons who are frequently referred to as "private household workers." See S. Rep. 93-690, p. 20. The domestic service must be performed in or about the private home of the employer whether that home is a fixed place of abode or a temporary dwelling as in the case of an individual or family traveling on vacation. A separate and distinct dwelling maintained by an individual or a family in an apartment house, condominium or hotel may constitute a private home.

The statement in section 552.3 that domestic service employment is "performed by an employee in or about the private home . . . *of the person by whom he or she is employed*," and the statement in section 552.101(a) that domestic service employment "must be performed in or about the private home *of the employer*," could be read to exclude companions who are employed by third party employers from the scope of the exemption. As explained above, however, there is no reason to believe that the Department intended the provisions to have that effect. Because there are available readings of the various regulations that allow them to be internally reconciled, the Department believes that they can and should be read in harmony. *See generally* 73 CJS Public Admin. Law and Proc. § 211 (2005) ("The court should

read a regulation as an entirety, and should harmonize the various parts and provisions of the entire regulation and give them effect, if possible.").

Sections 552.3 and 552.101 are best read as describing the kinds of work that constitute domestic service employment and establishing that such work must be performed in a private home, rather than in a place of business. The references in those provisions to domestic service employment needing to be performed in the home of the employer are not intended to address the issue of third party employment, but rather are an extraneous vestige of the language's origin in the Social Security regulations. *See* S. Rep. No. 93-690, *supra*, at 20. *See also* 20 C.F.R. § 404.1057 (social security regulation describing "[d]omestic service in the employer's home"); 26 C.F.R. § 31.3121(a)(7)-1(a)(2) (social security tax regulation describing "[d]omestic service in a private home of the employer").

Because the Department borrowed the language of sections 552.3 and 552.101 from the congressional committee reports underlying the 1974 amendments to the FLSA without discussion or elaboration, the legislative history must be consulted to determine their meaning. Significantly, while the legislation was being drafted, Congress repeatedly referred to and discussed in detail its view that work must be performed in a private home to qualify as "domestic service employment." For example, the 1974 amendments extending FLSA coverage to domestic workers did so by referring to employees "employed in domestic service *in a household*." P.L. 93-259, § 7(b)(1), 88 Stat. 55, 62 (1974) (emphasis added). The committee reports, in turn, described the newly covered workers using a variety of phrases emphasizing the importance of the employment bring performed in a pri-

vate home: "domestic service employees in *private households*," S. Rep. No. 93-300, *supra*, at 20 (emphasis added); "domestic service *in and about a private home*," *id.* at 22 (emphasis added); "domestic service employees *employed in households*," H.R. Rep. No. 93-232, *supra*, at 31 (emphasis added); "*household* domestic employees," S. Rep. No. 93-758, *supra*, at 27 (emphasis added); "employee in domestic service *in a household*," *id.* (emphasis added); "domestic service workers," H.R. Rep. No. 93-913, *supra*, at 11; and "*private household* workers." S. Rep. No. 93-690, *supra*, at 19 (emphasis added). Indeed, the reports contain a detailed discussion of Congress's intention to require that covered domestic service be performed in a private home:

> The domestic service must be performed in a private home which is a fixed place of abode of an individual family. A separate and distinct dwelling maintained by an individual or family in an apartment house or hotel may constitute a private home. However, a dwelling house used primarily as a boarding or lodging house for the purpose of supplying such services to the public, as a business enterprise, is not a private home.

S. Rep. No. 93-300, *supra*, at 22. See also S. Rep. No. 93-690, *supra*, at 20 (same); H.R. Rep. No. 93-913, *supra*, at 33 (same). This passage is particularly significant because it supplies content and meaning to the sentence immediately preceding it—specifically, the previously referenced sentence that draws upon the language of the Social Security regulations to define "domestic service employment" and states that its generally accepted meaning relates to "services of a household nature performed by an employee in or about a private

home of the person by whom he or she is employed." The fact that the sentence is immediately followed by a descriptive passage elaborating on the sentence's requirement that domestic service employment must be performed in a private home, but making no mention at all of the issue of third party employment, makes it clear that the sole purpose of the sentence is to specify the place where domestic service employment must be performed.

The sentence from the committee report is incorporated virtually verbatim into section 552.3, with the only modification being the addition of a brief parenthetical specifying that a private home can be fixed or temporary. In the view of the Department, when the sentence was imported into the regulations from the committee report, it carried with it the meaning ascribed to it by Congress. The Department signaled its understanding that the sentence should be read as addressing place of performance but as not speaking to third party employment in two distinct ways. First, the one change the Department made to the sentence was the insertion of a parenthetical explaining that, with respect to the place of performance, a private home can either be fixed or temporary. The insertion of the parenthetical shows that the Department was primarily concerned with clarifying the operative effect of the regulation on the place of performance requirement. Second, the Department drafted a separate regulatory provision specifically to address the issue of third party employment. This would have been entirely unnecessary if the definition of domestic service employment excluded third party employment—particularly at the NPRM stage, when the meaning of the two provisions would have been aligned. In sum, all signs indicate that neither Congress nor the

Department intended the sentence that first appeared in the committee report and was then incorporated into section 552.3 to be construed as excluding employees who are employed by third party employers from the definition of domestic service employment.

In fact, if the sentence in question were construed as excluding all employees of third party employers from the definition of domestic service employment, it would have the perverse effect of excluding many domestic workers from the coverage of the FLSA—despite Congress' express intent "to include within the coverage of the Act *all* employees whose vocation is domestic service," excepting only casual babysitters and companions for the aged and infirm. *See* S. Rep. No. 93-690, *supra*, at 20 (emphasis added); see also H.R. Conf. Rep. No. 93-413, at 27 (1973); S. Conf. Rep. No. 93-358, at 27 (1973). Prior to the enactment of the 1974 amendments, the only domestic workers that were covered by the FLSA were those employed by "covered enterprises," which are currently defined by the FLSA as businesses with annual gross sales of at least $500,000 that employ at least two employees in interstate commerce. *See* 29 U.S.C. § 203(s); see also 29 U.S.C. § 203(s) (1970) ($250,000 threshold applicable at time of 1974 amendments). Two categories of domestic workers generally were not covered prior to the amendments: those employed by homeowners because there usually was no basis for individual coverage and those employed by third party employers that did not meet the test for enterprise coverage. There can be no question that Congress intended for the 1974 amendments generally to cover both of these categories, with only a few expressly enumerated exceptions. Yet if the sentence in the committee report is construed as excluding all third party

employers from the definition of domestic service employment, then those domestic workers who are employed by third party employers that are not covered enterprises would to this very day not be covered by the FLSA.[1] That result is contrary to Congress' express intent, and cannot be correct.

Sections 552.3 and 552.101(a) should also not be read as addressing the issue of third party employment because doing so would render them inconsistent with themselves. Section 552.101, which elaborates on the definition of domestic service employment provided by section 552.3, specifies that "private household workers" are included within the definition of domestic service employees. The term "private household workers" has long been understood by both Congress and the Department to include the employees of third party employers. During the time Congress was considering the 1974 amendments to the FLSA, the Department submitted reports defining the term as:

---

[1] Unlike the sentence in the committee report, section 552.3 of the regulations purports to define domestic service employment only "[a]s used in section 13(a)(15) of the Act." As mentioned previously, however, since the Department copied the sentence from the committee report virtually verbatim into the regulations, there is no reason to believe that the Department intended for it to have a different meaning than the one that was attached to it by Congress. Indeed, there is good reason to believe that despite section 552.3's purported limitation of the definition to the companionship exemption, the Department in fact intended the provision to supply a general definition of the term as used throughout the Act. First, there is no other provision in the regulations that supplies an alternative definition of domestic service employment. Second, the examples that the regulation provides of workers that qualify as domestic service employees—including gardeners, handymen, janitors, grooms, and valets—have little or nothing to do with the provision of companionship services, but instead fall within the broader category of domestic workers generally. *See* 29 C.F.R. 552.3.

> [A]nyone aged 14 and over working for wages, including pay-in-kind, in or about a private residence who was employed by (1) a member of the household occupying that residence or (2) a household service business whose services had been requested by a member of the household occupying that residence.

See Department's 1973 Report to Congress on Minimum Wage and Maximum Hours Standards under the Fair Labor Standards Act at 27; 1974 Report at 31-32. The second prong of the definition unambiguously includes domestic workers who are employed by third party employers. It is not surprising that the Department incorporated private household workers into the regulations' definition of domestic service employment, since Congress referred to the Department's reports on several occasions, *see* H.R. Rep. No. 92-232, *supra*, at 31; H.R. Rep. No. 93-913, *supra*, at 33; S. Rep. No. 93-690, *supra*, at 19-20; 119 Cong. Rec. 24,796 (statement of Sen. Dominick), and repeatedly used the phrase "private household workers" interchangeably with the term "domestic service employees." *See* H.R. Rep. No. 93-233, *supra*, at 31 (using the term "domestic service employees" and "private household workers" in a single paragraph to describe the same set of employees); S. Rep. No. 93-300, *supra*, at 21-22 (describing the same set of employees in successive paragraphs using the interchangeable terms "private household workers," "domestics," "household workers," and "domestic workers"); H.R. Rep. No. 93-913, *supra*, at 33; S. Rep. No. 93-690, *supra*, at 19. In fact, the Department's definition of "private household worker" was quoted in full during the floor debate in the Senate on the amendments to the FLSA. *See* 119 Cong. Rec. at 24,796 (statement of Sen.

Dominick). Since section 552.101(a) clearly states that at least some domestic workers employed by third party employers are included within the definition of domestic service employees, it makes no sense to construe the ambiguous language requiring that domestic service "be performed in or about the private home of the employer" as designed to exclude them.

The governing rules of legal interpretation require the Department to adopt a reading of the regulations that harmonizes them and renders them internally consistent as a whole. *See Jay* v. *Boyd*, 351 U.S. 345, 360 (1956) (Court must read regulations "so as to give effect, if possible, to all of its provisions"); *APWU* v. *Potter*, 343 F.3d 619, 626 (2d Cir. 2003) ("[A] basic tenet of statutory construction, equally applicable to regulatory construction, [is] that [a text] should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error") (citations and internal quotations omitted); *Miller* v. *AT&T Corp.*, 250 F.3d 820, 832 (4th Cir. 2001) ("Whenever possible, this court must reconcile apparently conflicting provisions"). If sections 552.3 and 552.101(a) were read to exclude third party employees from the definition of domestic service employment, it would not only create a conflict with section 552.109(a), but it would also be inconsistent with section 552.101(a)'s inclusion of "private household workers" within the definition of domestic service employment and with Congress's express intent "to include within the coverage of the Act all employees whose vocation is domestic service." *See* S. Rep. No. 93-690, *supra*, at 20; H.R. Conf. Rep. No. 93-413, *supra*, at 27; S. Conf. Rep. No. 93-358, *supra*, at 27. By contrast, when sec-

tions 552.3 and 552.101(a) are read as requiring that domestic service employment be performed in private homes, but as not addressing the issue of third party employment, the regulations are fully harmonized and rendered internally consistent. Consequently, the Department reads sections 552.3 and 552.101(a) as not addressing the issue of third party employment. Read in that context, I find no inconsistency between sections 552.3 and 552.109(a). All prior statements by the Department to the contrary, including the Department's January 19, 2001 NPRM, *see* 66 Fed. Reg. at 5485, are hereby repudiated and withdrawn.

The Department is aware that the Second Circuit suggested in *Coke* v. *Long Island Health Care, Ltd.*, 376 F.3d at 131-33, that the Department's regulations governing third party employment were intended to be advisory interpretations only, and that they therefore do not have the force and effect of law. That is not the case; the Department considers the third party employment regulations at 29 C.F.R. 552.109 to be authoritative and legally binding. When the Department promulgated the final regulations in February 1975, it noted that as originally proposed, section 552.109(a) "would not have *allowed* the [FLSA] section 13(a)(15) or the [FLSA] section 13(b)(21) exemption for employees who, although providing companionship services, are employed by an employer or agency other than the family or household using their services." 40 Fed. Reg. 7404-05 (emphasis added). The Department stated in the final rule that it had changed its mind, "conclud[ing] that these exemptions *can be available* to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services." *Id.* at 7405 (emphasis added). The highlighted language makes it clear that at

the time the final rule was promulgated, the Department believed that the availability of the companionship exemption to third party employers turned decisively on its pronouncement in the regulations—something that could be true only of a legislative rule. Accordingly, the Department has always treated the third party employment regulations as legally binding legislative rules, and it will continue to do so on an ongoing basis.

(5)

Supreme Court, U.S.
FILED
APR 2 9 2005
OFFICE OF THE CLERK

No. 04-1315

IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD. AND MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* CONTINUING CARE LEADERSHIP COALITION, INC. IN SUPPORT OF PETITIONER

ROXANNE TENA-NELSON
CONTINUING CARE LEADERSHIP COALITION, INC.
555 West 57th Street
New York, New York 10019
(212) 258-5330

AARON J. SCHINDEL
Counsel of Record
PROSKAUER ROSE, LLP
1585 Broadway
New York, New York 10036
(212) 969-3000

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	2
SUMMARY OF ARGUMENT	3
I. THE INVALIDATION OF THE THIRD PARTY EMPLOYER EXEMPTION SEVERELY UNDERMINE'S NEW YORK'S HEALTH CARE SYSTEM AND THE QUALITY OF CARE TO ITS PATIENTS	4
A. The Decision Below Will Have a Severe Negative Impact on the Continuum of Care in New York	4
1. Impact on the Long Term Care System	4
2. Impact on Home Care Wage and Benefit Negotiations	6
3. Impact on the Flow of Health Care	6
B. The Decision Below Undermines New York's Capacity to Fulfill Its Commitment to Home Care Services as an Essential Element of the Long Term Care System	7
1. Inconsistency with the *Olmstead* Decision	7
2. Impact on New York's Managed Long Term Care Program	9
C. The Decision Below Will Have a Severe Negative Impact on Patients	10
CONCLUSION	11
EXHIBIT A	1a

TABLE OF AUTHORITIES

CASES	Page
Coke v. Long Island Care at Home, Ltd., 376 F.3d 118 (2d Cir. 2004)	2
Olmstead v. L. C., 527 U.S. 581 (1999)	8
STATUTES	
29 C.F.R. § 522.109(a)	2, 11
OTHER AUTHORITIES	
Alene Hokenstad, Keeping Care at Home: Strategies for Expanding Medicaid Managed Long Term Care, United Hospital Fund (Mar. 2004)	5
Attachment to Memorandum from Neil P. Benjamin, Assistant Director, Division of Health Facility Planning, New York State Department of Health, to Members of the Planning Committee and the Codes and Regulations Committee of the State Hospital Review and Planning Council (Jan. 17, 2003)	8
BDO Seidman, A Report on Shortfalls in Medicaid Funding for Nursing Home Care (Dec. 2003)	5
Ellen Rosenzweig, Home Care, New York Elder Law Handbook (2000)	5
Exec. Order No. 13217, 66 Fed Reg. 33155 (June 18, 2001)	8
Jennifer Rosenbaum, Jurgis Karuza, *et. al.*, Long Term Care, Project 2015: The Future of Aging in New York State, New York State Office for the Aging (2000)	5

TABLE OF AUTHORITIES—Continued

	Page
Letter from Dennis Smith, Director, Center for Medicaid and State Operations, Center for Medicare and Medicaid Services, U.S. Department of Health and Human Services to State Medicaid Directors of the State Hospital Review and Planning Council (Aug. 17, 2003)	9
Lisa Colangelo, Aides Strike Ends, New York Daily News (June 10, 2004)	6
New York State Department of Health, Managed Long Term Care Enrollment by Provider and County (Aug. 2004)	9
New York State Department of Health, Managed Long Term Care Program (June 2004)	10
New York State Department of Health, Most Integrated Setting Coordinating Council (Aug. 2004)	9
Robyn Stone, Long Term Care for the Elderly with Disabilities: Current Policy, Emerging Trends, and Implications for the Twenty-first Century, Milbank Memorial Fund (2000)	5

IN THE

Supreme Court of the United States

No. 04-1315

LONG ISLAND CARE AT HOME, LTD. AND MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* CONTINUING CARE LEADERSHIP COALITION, INC. IN SUPPORT OF PETITIONER

Pursuant to Rule 37(2)(a) of the Rules of this Court, this brief is respectfully submitted on behalf of *amicus curiae* the Continuing Care Leadership Coalition ("CCLC") in support of the Petition for Writ of Certiorari filed by Petitioner Long Island Care at Home, Ltd. The consent of the parties to the filing of this brief has been received, and has been submitted to the Court.[1]

[1] No counsel for a party authored this brief in whole or in part; nor did any person or entity, other than *amicus* and its counsel, make a monetary contribution to the preparation or submission of this brief.

IINTEREST OF *AMICUS CURIAE*

The Continuing Care Leadership Coalition (CCLC) represents the interests of over 100 not-for-profit and public organizations providing long term care services in metropolitan New York and beyond. Our membership includes forty-three (43) mission-driven home care providers who offer essential health care and other services to tens of thousands of individuals in their homes. The remainder of our membership relies heavily on the existing home care system in order to provide a full range of long term care services to older and disabled individuals in nursing facilities, adult day health care programs, and other community-based settings.

Specifically, CCLC supports and promotes high-quality, cost-effective long term care services for citizens of New York State on behalf of our long term care provider members. CCLC acts as an advocate for its members with respect to issues pertaining to payment and reimbursement, policy analysis and implementation, regulatory and professional affairs and, in that capacity, is familiar with the circumstances facing its members and the potential impact of this case.

The issue before the Court is of exceptional importance to CCLC and its member organizations, and CCLC is in a unique position to describe the potentially severe negative impact of the decision below—that the third-party employer exemption in 29 C.F.R. § 522.109(a) is unenforceable[2]—on health care providers in New York State.

Indeed, CCLC's members and their affiliates will be severely injured by increased costs for home care services, costs that cannot be absorbed by a financially fragile health care sector that disproportionately relies on government reimbursement. Thus, the outcome of this case is of critical importance to the immediate and future financial viability of CCLC's members and their affiliates and their ability to

---

[2] *Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118 (2d Cir. 2004).

provide needed services to elderly and disabled residents of New York.

SUMMARY OF ARGUMENT

Since the 1970s, New York State has structured the delivery of home care services upon long-standing regulations promulgated by the U.S. Department of Labor, which provided a third party employer exemption from federal minimum wage and overtime pay requirements. Within the past year, these long-standing regulations were a key factor in the successful labor-management bargaining process. The court decision below invalidated these regulations, a decision that has the grave potential to destabilize home care service delivery, the long term care system (which heavily relies on home care services), and the broader health care system in New York.

Specifically, the decision below will undermine advancements in care for the disabled, moving backward from the seminal *Olmstead* decision, which requires states to provide services in the least restrictive and most appropriate setting. Additionally, the decision below threatens New York's innovative managed long term care program, which allows frail older people to remain in the community and receive health care services through a capitated financing arrangement.

Furthermore if the decision below stands, it will have a severe negative impact on tens of thousands of older and disabled individuals receiving home care services through CCLC's member provider organizations. The decision will drive home care costs up, costs that cannot be absorbed by a financially fragile health care sector that disproportionately relies on government sources (predominately Medicaid) for primary payment.

Therefore, CCLC respectfully requests that the Court grant Long Island Care at Home's Petition for Writ of Certiorari.

ARGUMENT

I. THE INVALIDATION OF THE THIRD PARTY EMPLOYER EXEMPTION SEVERELY UNDERMINE'S NEW YORK'S HEALTH CARE SYSTEM AND THE QUALITY OF CARE TO ITS PATIENTS

A. The Decision Below Will Have a Severe Negative Impact on the Continuum of Care in New York.

1. *Impact on the Long Term Care System*

The court's invalidation of the third party employer exemption will directly increase expenses for long term care organizations that operate home health care agencies and will also increase expenses for other components of the health care system that rely on home health care services. The resulting disruption in the continuum of care will negatively affect patients receiving and seeking health care services.

Long term care organizations provide an essential service to patients and families by caring for New York's older and disabled population. The continuing care system consists of various components, including but not limited to, skilled nursing care, home health care, managed long term care programs, subacute care, and adult day health care. CCLC's member organizations, in particular, provide long term care for a variety of specialty populations beyond the frail elderly that include children, people with HIV/AIDS, people with Alzheimer's Disease or other dementias, people with traumatic brain injury, people with Huntington's disease, and the visually or hearing impaired.

CCLC's member organizations have been at the forefront of innovation in long term care financing and service delivery. During the 1970s, New York made a commitment to integrating home and community-based care into the long

term care system.[3] Consistent with this commitment, many of CCLC's members played pioneering roles in the development and expansion of home and community based services and the development of managed long term care programs, which include the Social HMO and the Program of All-Inclusive Care for the Elderly (PACE) programs.[4]

Unfortunately, long term care providers in New York and throughout the nation rely heavily on governmental payments that typically do not reflect current health care costs. This necessity contributes significantly to a situation in which a substantial proportion of long term care providers are financially at risk.[5] Based upon CCLC's analysis of audited financial statements for the most recent year in which data are available, 2003, over half (317 or 55%) of 572 long term care organizations (including freestanding nursing homes and multi-service long term care organizations) in New York State with available data experienced negative operating margins.

Of these financially distressed organizations, a substantial percentage operate home health agencies and thus would be subject to additional financial hardship should the court's

---

[3] Ellen Rosenzweig, Home Care, New York Elder Law Handbook (2000).

[4] Jennifer Rosenbaum, Jurgis Karuza, *et. al.*, Long Term Care, Project 2015: The Future of Aging in New York State, New York State Office for the Aging (2000) *available at* http://aging.state.ny.us/explore/project2015/artLTC.pdf. *See also* Alene Hokenstad, Keeping Care at Home: Strategies for Expanding Medicaid Managed Long Term Care, United Hospital Fund (Mar. 2004) *available at* http://www.uhfnyc.org/usr_doc/keeping_care_at_home.pdf.

[5] Robyn Stone, Long Term Care for the Elderly with Disabilities: Current Policy, Emerging Trends, and Implications for the Twenty-first Century, Milbank Memorial Fund (2000) *available at* http://www. milbank.org/reports/0008stone/. *See also* BDO Seidman, A Report on Shortfalls in Medicaid Funding for Nursing Home Care (Dec. 2003) *available at* http://www.ahca.org/brief/seidmanstudy0312.pdf.

decision stand. These financial strains would compound existing cost pressures associated with an increasingly burdensome set of regulatory requirements, a variety of workforce challenges, and resource intensive quality improvement initiatives.

2. *Impact on Home Care Wage and Benefit Negotiations*

Long term care providers share an interest in paying home care workers a reasonable wage and benefit package in order to retain talented staff. As home care agencies grapple with a limited supply of talented staff as a result of workforce shortages and the projected demand for long term care workers to care for our aging population, they have made progress toward achieving important wage and benefit increases, reflected in recent labor negotiations.[6] However, the court's decision will significantly disrupt the progress of recognizing the common need for a reasonable wage and benefit package and undermine achievements made between labor and management. Not only will the court's decision destabilize the labor-management bargaining process, but it will also create new unfunded expenses, further distressing a significant proportion of New York's long term care organizations.

3. *Impact on the Flow of Health Care*

The court's decision below will also obstruct the flow of health care delivery between hospitals and home health care agencies. Home health care services are an essential part of the continuum of care for patients who receive both long term and acute care services. Hospitals rely on home health agencies to receive and care for patients who can be discharged home, rather than having patients linger in the hospital for longer than necessary. Particularly for individuals in New

---

[6] Lisa Colangelo, Aides Strike Ends, New York Daily News (June 10, 2004) at 44.

York City that are discharged from the hospital to a home health agency through The Bridge Program, the court's decision will be harmful. The Bridge Program is an expedited hospital discharge program under the direction of the New York City Human Resources Administration that allows hospital patients to be discharged to Certified Home Health Agencies pending the availability of personal care services.

More generally, the court's decision, by creating disruptions in the continuity of care provided by home health agencies, impairs the ability of hospitals to discharge patients to more appropriate home and community settings in a timely manner, and thus increases the average length of stay and creates a new financial burden on already financially fragile acute care institutions. Based on CCLC's recent analysis of 2002 State hospital discharge data, CCLC estimates that a one day increase in the length of stay for patients in New York hospitals that are discharged to home health agencies would cost the health care system $96 million. Because of the shared responsibilities involved in Medicaid reimbursement, an additional day will increase costs to hospitals, the State, local governments, the Federal government, and the workers' compensation system. In addition to this undesirable economic effect, an increased length of stay will result in less access to hospital beds for patients who need them.

B. The Decision Below Undermines New York's Capacity to Fulfill Its Commitment to Home Care Services as an Essential Element of the Long Term Care System.

1. *Inconsistency with the* Olmstead *Decision*

The court's decision will undermine New York's commitment to home care as an essential element of the State's long term care system. Since the 1970s, when New York State made a policy decision to make home care services a core element of our long term care system, New York has contin-

ued its commitment to offering long term care services in the least restrictive setting by supporting its home and community-based services programs. New York's commitment to home care is consistent with the U.S. Supreme Court's decision in *Olmstead*[7], which found that state and public agencies must make reasonable accommodations to enable disabled individuals to receive services in the least restrictive setting under Title II of the Americans with Disabilities Act (ADA). The generous mix of home and community-based programs available to older and disabled people has helped over 121,000 older New Yorkers, 76% of whom are in the New York City region, continue to live in the community with the needed supports.[8]

In fact, Federal and State agencies have supported programs pursuant to *Olmstead* to help patients, families and other informal caregivers take care of loved ones at home and lead more normal lives. The Bush Administration announced the New Freedom Initiative on February 1, 2003, which is aimed to encourage home and community-based care for older and disabled persons and establish grants to help States implement their plans pursuant to *Olmstead*.[9] On August 17, 2004, the U.S. Department of Health and Human Services, Center for Medicare and Medicaid Services, reconfirmed its commitment to supporting *Olmstead* through the Money Follows the Person program, which emphasizes the need for a

---

[7] *Id.*

[8] *See* Ex. A (Memorandum from Neil P. Benjamin, Assistant Director, Division of Health Facility Planning, New York State Department of Health, to Members of the Planning Committee and the Codes and Regulations Committee of the State Hospital Review and Planning Council (Jan. 17, 2003) (submitted to consider use of home and community services in the development of a revised methodology to update the nursing home utilization data)).

[9] Exec. Order No. 13217, 66 Fed Reg. 33155 (June 18, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/06/20010619.html.

solid long term care system that features home and community-based care.[10] In New York State, Governor Pataki created the Most Integrated Setting Coordinating Council guided by the principles set forth under the *Olmstead* decision to empower older and disabled individuals to live more independently in the community[11] and reiterated this commitment in his State of the State address on January 5, 2005. Insofar as the court's decision will undermine and destabilize the home care infrastructure in New York, the decision is inconsistent with and detrimental to the above State and federal efforts to promote and expand home and community based services.

2. *Impact on New York's Managed Long Term Care Program*

The court's decision and the resulting inevitable increase in costs for home health agencies will also damage one particular component of the long term care system, managed long term care programs. Managed long term care programs allow nearly 12,000 frail older and disabled New Yorkers, 89% of whom are in the New York City region, to remain in the community and receive needed long term care services.[12] Unlike the typical home health care patient, participants in the managed long term care program are frail enough to enter a nursing home. Managed long term care programs allow older

---

[10] Letter from Dennis Smith, Director, Center for Medicaid and State Operations, Center for Medicare and Medicaid Services, U.S. Department of Health and Human Services to State Medicaid Directors (Aug. 17, 2003) (submitted to State Medicaid Directors updating States on CMS' commitment to principles under *Olmstead*) (http://www.cms.hhs.gov/states/letters/smd081704.pdf).

[11] New York State Department of Health, Most Integrated Setting Coordinating Council (Aug. 2004) *available at* http://www.health.state.ny.us/nysdoh/miscc/index.html.

[12] New York State Department of Health, Managed Long Term Care Enrollment by Provider and County (Aug. 2004) (http://www.health.state.ny.us/nysdoh/mancare/medicaid/2004/en8_04.pdf).

people to live at home and receive health services, such as medical care, social services, nutritional services, and rehabilitation, through the program.[13] The current level and structure of home health care services are essential to the managed long term care program and to meeting patients' preferences to remain in the community.

Because managed long term care programs are reimbursed through a fixed, capitated payment for each participant, an increase in the cost for home health care services will gravely affect this important program. Managed long term care programs must negotiate a Medicaid payment rate with the New York State Department of Health on an annual basis. The currently negotiated rates would not reflect the increased costs for home health care that are inevitable if the court's decision is upheld. In future years, the State might choose not to increase payment rates (in fact, in New York's recently adopted budget for State Fiscal Year 2005-2006, managed long term care premiums were explicitly frozen until at least March 31, 2006) and managed long term care plans would be forced to turn away new participants, reduce services, or even close in order to pay for the cost of services provided. In addition, the court's decision will disrupt other components of the long term care system that rely on home health care services, such as adult day health care, long term home health care or the "nursing home without walls" program, and senior housing.

C. The Decision Below Will Have a Severe Negative Impact on Patients.

Finally, the court's invalidation of the third party employer exemption would limit the flexibility currently treasured by many thousands of patients receiving home health care and

---

[13] New York State Department of Health, Managed Long Term Care Program (June 2004) (http://www.health.state.ny.us/nysdoh/mancare/mltc/index.html).

personal care services through the Medicaid program. To comply with the court's decision, home health care agencies, unable to afford costs that are not covered by government reimbursements, will be forced to decrease or eliminate overtime hours and increase part-time staff. In essence, the court's decision will fracture the continuity of care for home care patients and sever multi-year relationships between patients and caregivers. These unintended results, as well as the potential for uncovered shifts, will severely limit access for all individuals needing home care.

This cannot be the result. This Court must review relevant statutory sections to determine their intended meaning and purpose, and the Court must ensure that the third party employer exemption in 29 C.F.R. § 552.109(a) be upheld. Otherwise, the lower court's decision will have a severe and immediate impact on the older and disabled individuals receiving companionship services, the hospitals in our State, and on the long term care system as a whole.

CONCLUSION

For all of the aforementioned reasons, CCLC respectfully requests that the Court grant Long Island Care at Home's Petition for Writ of Certiorari, and grant such other and further relief as the Court deems proper.

Respectfully submitted,

ROXANNE TENA-NELSON
CONTINUING CARE LEADERSHIP COALITION, INC.
555 West 57th Street
New York, New York 10019
(212) 258-5330

AARON J. SCHINDEL
Counsel of Record
PROSKAUER ROSE, LLP
1585 Broadway
New York, New York 10036
(212) 969-3000

Counsel for Amicus Curiae

April 29, 2005

EXHIBIT

EXHIBIT A

STATE ON NEW YORK—
DEPARTMENT OF HEATLH

INTEROFFICE MEMORANDUM

TO: Members of the Planning Committee and the Codes and Regulations Committee

FROM: Neil P. Benjamin, Assistant Director Division of Health Facility Planning

DATE: January 17, 2003

At the last meeting of the SHRPC, the discussion culminated in staff reevaluation of four key points, to be returned to the joint committees for their consideration this agenda cycle. These issues, with comments by staff, are described below.

1. Develop a process for use of more current nursing home utilization data where relevant.

Historically, the Department has used the most recent year for which utilization data from certified RHCF cost reports are available. While such information is certainly the most reliable, it poses issues of timing, in that there is typically a significant lag (18 to 24 months) between the close of a cost-report year and the compilation of statewide numbers by DOH, with the value of the data declining in proportion to the length of the lag. The most practical alternative to this problem is to identify a source of data that would be reliable yet more current. Consistent with discussions at the November meeting, staff contacted representatives from the nursing home trade associations to determine if such data could be compiled. Both groups have indicated a willingness to assist the Department in developing a process through which their databases could be utilized to provide more timely information. Department staff will meet with rep-

resentatives of the associations to develop such a process and will keep the Council apprised of these efforts.

2. Projected Need for Community-Based Programs

Some members of the Council requested a chart illustrating the current resource of long-term home health care and community-based services. Members felt that a discussion of this segment of the post-acute continuum and its impact on the planning for RHCF beds should occur within the revision process for section 709.3. The attached chart shows the availability of such services in 2000, by county, and projected to 2007. The format is consistent with 709.3(d)(12), which lists RHCF bed need by county. Mr. Robert Dougherty will act as lead DOH staff on this topic.

3. Revised draft of the regulations

A revised draft of section 709.3 is attached. This differs from the draft distributed with the December 5, 2002 SHRPC agenda only in changes to subdivision (h), which addresses local factors. The revised subdivision clarifies that local factors are to be applied only after an affirmative finding of need under subdivisions (d) or (e), which, respectively, set forth the county-based need methodology and address the application of HSA long-term care plans for areas where HSAs are operational.

The practical effect of this is that review of local factors would be applied regardless of whether a county's utilization were above or below 97 percent. The influence of the 97 percent factor on bed need recommendations has been discussed extensively in previous meetings. Extending local factor review provides the Department and the Council with broader discretion in making judgments about the post-acute delivery system in a particular community. For example, an application in a county with need and occupancy above 97 percent could conceivably

be recommended for disapproval if review of local factors warrants. Conversely, an applicant in a county with need but with occupancy below 97 percent could be found in need after review of local factors. This, coupled with more current data (as described in item 1, above), provides section 709.3 greater flexibility in making judgments about what is best for a given community and the health care delivery system in general with respect to long-term care services.

4. Revised flow chart

   A revised chart showing the sequence of steps in the public need review of applications for nursing home beds is also attached.

In addition to the above issues, I reported at the last meeting that the Central New York HSA had submitted comments on the draft need methodology. A copy of those comments is attached for your discussion.

Final 2007 Need - Residential Health Care Facility and Other LTC Resources 1/15/2003

County	2007 Final Need (RHCF)	*Existing Beds 37547	Unmet Need: 2007 Final Need Minus Existing Beds	2000 Frail Elderly ACF Census	2000 ALP Census	Supportive Housing	2007 Estimated Supportive Housing	2000 LTHHCP Census	2000 CHHA 90 Days Plus Census	2000 Personal Census	Community Based	2007 Estimated Community Based
Albany	2,351	2,498	(147)	422	45	467	437	377	436	308	1,121	1,686
Allegany	343	361	(18)	103	0	103	82	52	116	107	275	317
Broome	1,682	1,715	(33)	446	67	513	401	214	173	408	795	1,180
Cattaraugus	597	574	23	168	0	168	136	63	93	179	335	462
Cayuga	557	589	(32)	255	55	310	223	3	66	108	177	384
Chautauqua	1,172	1,314	(142)	373	63	436	303	178	16	417	611	826
Chemung	702	736	(34)	214	0	214	164	11	84	249	344	494
Chenango	457	564	(107)	81	0	81	68	0	307	98	405	373
Clinton	557	482	75	60	0	60	83	50	143	234	427	550
Columbia	752	806	(54)	70	0	70	89	63	89	58	210	386
Cortland	329	400	(71)	70	0	70	56	83	142	82	307	293
Delaware	448	443	5	88	0	88	86	32	130	110	272	357
Dutchess	1,925	1,972	(47)	131	77	208	270	249	224	312	785	1,385
Erie	6,975	7,131	(156)	2,204	162	2,366	1,862	763	2,528	1,593	4,884	6,173
Essex	244	338	(94)	86	0	86	56	0	77	111	188	202
Franklin	229	235	(6)	45	0	45	41	27	304	230	561	371
Fulton	375	360	15	79	17	96	82	121	102	174	397	402
Genesee	468	508	(40)	84	0	84	82	31	86	53	170	298
Greene	383	256	127	119	12	131	140	27	15	37	79	257
Hamilton	17	0	17	0	0	0	3	0	28	26	54	41
Herkimer	445	557	(112)	145	0	145	96	26	181	128	335	358
Jefferson	642	719	(77)	105	0	105	102	92	124	154	370	514
Lewis	150	160	(10)	12	0	12	18	0	33	77	110	132
Livingston	402	402	(0)	73	0	73	75	0	109	37	146	282
Madison	438	400	38	58	0	58	72	55	80	14	149	311
Monroe	5,060	5,727	(667)	1,362	93	1,455	1,136	1,289	1,673	35	2,997	3,975
Montgomery	534	590	(56)	105	36	141	115	87	43	126	256	357
Nassau	9,008	7,793	1,215	1,456	0	1,456	1,740	946	669	2,706	4,321	7,441
Niagara	1,841	1,730	111	128	146	274	320	115	86	336	537	1,148
Oneida	2,349	2,779	(430)	315	100	415	382	81	446	315	842	1,381
Onondaga	3,270	3,097	173	774	68	842	757	124	657	643	1,424	2,398
Ontario	645	623	22	174	15	189	157	55	342	82	479	600
Orange	2,006	1,578	428	325	55	380	488	361	228	465	1,054	1,749

Final 2007 Need - Residential Health Care Facility and Other LTC Resources 1/15/2003

County	2007 Final Need (RHCF)	*Existing Beds 37547	Unmet Need: 2007 Final Need Minus Existing Beds	2000 Frail Elderly ACF Census	2000 ALP Census	Supportive Housing	2007 Estimated Supportive Housing	2000 LTHHCP Census	2000 CHHA 90 Days Plus Census	2000 Personal Census	Community Based	2007 Estimated Community Based
Orleans	272	325	(53)	73	0	73	54	109	83	16	208	230
Oswego	705	729	(24)	90	0	90	102	81	206	162	449	604
Otsego	414	384	30	150	29	179	135	19	53	81	153	297
Putnam	476	320	156	0	0	0	43	48	172	62	282	538
Rensselaer	1,196	1,243	(47)	222	56	278	233	129	154	187	470	763
Rockland	2,058	1,736	322	297	140	437	468	220	464	242	926	1,647
St.Lawrence	666	893	(227)	73	0	73	82	67	306	454	827	675
Saratoga	1,257	825	432	163	0	163	233	76	87	71	234	809
Schenectady	1,239	1,382	(143)	253	0	253	231	212	338	128	678	922
Schoharie	174	125	49	59	24	83	66	0	43	63	106	170
Schuyler	119	120	(1)	58	39	97	55	0	81	27	108	120
Seneca	327	280	47	34	0	34	50	17	16	1	34	152
Steuben	797	699	98	144	0	144	154	56	160	41	257	526
Suffolk	9,193	8,634	559	1,714	0	1,714	1,893	646	2,714	1,217	4,577	7,716
Sullivan	586	487	99	81	0	81	98	51	95	159	305	476
Tioga	356	288	68	8	25	33	51	21	83	42	146	275
Tompkins	476	520	(44)	103	0	103	98	6	57	127	190	356
Ulster	1,279	1,322	(43)	116	98	214	215	177	220	384	781	1,045
Warren	432	402	30	151	0	151	115	30	213	124	367	417
Washington	513	530	(17)	63	0	63	68	51	132	102	285	365
Wayne	665	559	106	36	0	36	72	0	57	103	160	411
Westchester	6,742	7,156	(414)	413	0	413	726	1,261	922	1,481	3,664	5,285
Wyoming	350	340	10	35	0	35	50	0	151	51	202	293
Yates	162	196	(34)	51	0	51	37	4	82	41	127	139
Bronx	9,390	11,595	(2,205)	394	150	544	958	2,995	342	8,186	11,523	9,795
Kings	11,560	10,913	647	586	154	740	1,611	3,071	3,748	26,548	33,367	21,358
NewYork	7,027	7,305	(278)	225	115	340	926	2,335	10,812	9,578	22,725	12,683
Queens	14,270	12,406	1,864	404	470	874	1,727	2,632	1,259	7,676	11,567	15,200
Richmond	3,343	3,062	281	389	117	506	608	499	55	1,054	1,608	2,724
New York State	123,402	122,213	1,189	16,515	2,428	18,943	21,201	20,388	32,935	68,420	121,743	123,074

Supreme Court, U.S.
FILED
APR 29 2005
OFFICE OF THE CLERK

No. 04-1315

IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD. AND
MARYANN OSBORNE,
Petitioners,

v.

EVELYN COKE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF *AMICUS CURIAE* HOME CARE ASSOCIATION OF NEW YORK STATE, INC.

JOHN LONGSTRETH *
PRESTON GATES ELLIS &
ROUVELAS MEEDS LLP
1735 New York Avenue, NW
Washington, DC 20006
(202) 628-1700

Counsel for Amicus Home Care Association of New York, Inc.

* Counsel of Record

April 29, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE SECOND CIRCUIT'S DECISION CONTRAVENES ESTABLISHED PRINCIPLES OF ADMINISTRATIVE REVIEW AND AGENCY DEFERENCE, AND THUS IMPROPERLY SUBSTITUTES THE COURT'S OWN POLICY JUDGMENTS FOR THOSE OF CONGRESS AND THE AGENCY	5
A. The Rule Invalidated By The Second Circuit Is Fully Consistent With The Text Of The Statute And Its Legislative History	5
B. The Second Circuit Erred In Not Deferring To The Agency's Long-Standing Construction Of The Statute	9
II. THE SECOND CIRCUIT'S DECISION WILL CAUSE A MASSIVE DISRUPTION TO THE PROVISION OF AFFORDABLE HOME CARE SERVICES IN NEW YORK STATE	15
CONCLUSION	20

TABLE OF AUTHORITIES

CASES Page

Alaska Department of Envtl. Conservation v. EPA, 540 U.S. 461 (2004) 3, 7, 14
American Postal Workers' Union v. USPS, 707 F.2d 548 (D.C. Cir. 1983) 11, 12
Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir 2000) 4, 11
Barnhart v. Walton, 535 U.S. 212 (2002) 3, 7
BedRoc Ltd. v. United States, 541 U.S. 176 (2004) 8
Chevron U.S.A., Inc. v. National Res. Defense Council, Inc., 467 U.S. 837 (1984) ..... *passim*
Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist., 541 U.S. 246 (2004) 7, 8
Hartford Underwriters Ins. Co. v. Union Planters Bank,. N.A, 530 U.S. 1 (2000) 8
Hibbs v. Winn, 542 U.S. 88, 124 S. Ct. 2277 (2004) 7
Lamie v. United States Trustee, 540 U.S. 526 (2004) 8
McCune v., Oregon Senior Services Div., 894 F.2d 1107 (9th Cir. 1990) 17
National Family Planning and Reproductive Health Ass'n, Inc. v. Sullivan, 979 F.2d 227 (D.C. Cir. 1992) 13
North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982) 7
Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189 (1985) 8
Pharmaceutical Research & Manufacturers of Am. v. Thompson, 362 F.3d 817 (D.C. Cir. 2004) 12, 13
United States Telecom Ass'n v. FCC, 400 F.3d 29 (D.C. Cir. 2005) 11

TABLE OF AUTHORITIES—Continued

Page

United States v. Mead Corp., 533 U.S. 218 (2001) 3, 12, 13, 14

STATUTES AND RULES

29 U.S.C. § 213 (a)(15) 5, 10
29 C.F.R. § 552.6 9
29 C.F.R. § 552.109 ..... *passim*
10 N.Y.C.R.R. § 400.23 18

LEGISLATIVE AND REGULATORY HISTORY

H. Conf. Rep. No. 93-953 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2862 6
H.R. Rep No. 93-913 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811 6
118 Cong. Rec. 24,715 (1972) 9
40 Fed. Reg. 7404 (February 20, 1975) 15
67 Fed. Reg. 16,668 (Apr. 8, 2002) 15

OTHER AUTHORITIES

S. Greenhouse, *For Home Care Workers, A Fight for Pay, and Respect*, N.Y. Times, May 28, 2002, at B5. 17
Michael S. Sparer, *Medicaid and the Limits of State Health Reform*, 110-111 (1996) 19

IN THE

Supreme Court of the United States

No. 04-1315

LONG ISLAND CARE AT HOME, LTD. AND
MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* HOME CARE ASSOCIATION OF NEW YORK STATE, INC. [1]

INTEREST OF *AMICUS* [2]

Amicus Home Care Association of New York State, Inc. ("HCA" or "Home Care Association") is a not-for-profit organization that promotes and supports high-quality, cost-

[1] *Amicus* certifies that this brief was authored in whole by counsel for *Amicus* and no part of the brief was authored by any attorney for a party. No other person or entity made any monetary contribution to the preparation or submission of this brief.

[2] The written consents of the parties were requested and both parties have consented in writing to the filing of this brief. Copies of the written consents have been filed with the Clerk of the Court.

effective home care and community services for the citizens of New York State. The Association has approximately 250 members, most of which are non-profit and governmental home care provider agencies, and some of which are for-profit providers. HCA's members serve the majority of New York's Medicare and Medicaid beneficiaries receiving home care services, including 250,000 persons in New York City alone. HCA's President submitted a declaration in support of Petitioners' motion in the court of appeals for a stay of the mandate, which is included in the Appendix to the Petition for Certiorari ("Cert. Pet. App.") at pages 100a to 124a.[3]

The Second Circuit's decision imposes a devastating burden on the ability of HCA's provider members to provide high quality, affordable companionship services to elderly and infirm patients throughout New York State by invalidating a long-standing regulation of the United States Department of Labor ("DOL" or "agency"). That rule exempts home care companionship services from federal wage and overtime laws under the Fair Labor Standards Act ("FLSA"). It implements a statutory exemption that Congress enacted for the express purpose of making these domestic companionship services more widely available to those who need them, thus allowing them to avoid less desirable alternatives such as nursing home placement. The importance of the exemption in achieving these goals was recognized by the agency based on extensive rulemaking records it compiled when it promulgated the regulation in 1975 and when it determined in 2002 to retain it. The Second Circuit's decision ignored the extensive agency record, choosing instead to rule on the pleadings without consideration of any evidence as to the importance of the exemption to the hundreds of providers

---

[3] HCA and several other parties submitted *amicus* briefs in support of Petitioner's motion for rehearing and rehearing *en banc* in the court of appeals, but that court denied, without explanation, leave to file any of these briefs.

who have relied on it for thirty years to develop companionship services that have kept hundreds of thousands of people in their homes and communities.

The Home Care Association accordingly urges this Court to grant the Petition for Certiorari in order to eliminate the serious harms that invalidation of the rule creates for providers in New York State, and the uncertainties it creates for providers in other jurisdictions.

SUMMARY OF ARGUMENT

The Second Circuit's decision ignores the sound policy reasons invoked by Congress and the agency in enacting and continuing the long-standing exemption for home companionship services, and misapplies this Court's precedent. Rejecting the views of every other court to have considered the matter, including the Tenth Circuit, the Second Circuit invalidated the regulation even though it was (a) the subject of two full rounds of notice and comment rulemaking, (b) in place for thirty years with the acquiescence of Congress, and (c) fully consistent with the language of the governing statute. The Second Circuit's decision thus conflicts with numerous decisions of this Court, including *United States v. Mead Corp.*, 533 U.S. 218 (2001) ("*Mead*"), which requires full deference to an agency decision issued after formal procedures such as notice and comment rulemaking; *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461 (2004) and *Barnhart v. Walton*, 535 U.S. 212, 217 (2002), which grant "particular deference" to agency interpretations of "longstanding duration;" and *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.* ("*Chevron*"), 467 U.S. 837 (1984), which requires courts to defer to reasonable agency constructions of statutes they are charged to administer. The Second Circuit's assertion that deference was not appropriate because the agency chose to label the regulation as an "interpretation" is likewise inconsistent with a host of sound precedents that reject mechanical invocations

of form over substance. *See, e.g., Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir 2000)(finding it "well-established" that the key question is not the agency's "labeling" of the rule, but whether the "interpretation" carries the "force and effect of law.")

The Second Circuit decision thus creates the very result that sound principles of administrative review are intended to avoid. It upsets a reasonable and longstanding agency rule, around which important and necessary health care arrangements have been made for decades, without any consideration of the harmful effects of its ruling. As set out in the agency's rulemaking record and in submissions to the Second Circuit by numerous affected parties, the exemption of domestic companionship services under the FLSA is critical to the quality of care. The budgets of the service providers represented by HCA are severely constrained and are dependent on government reimbursements, predominantly through Medicaid, that are themselves decreasing due to state budget constraints and significant lag times in reimbursement calculations. *See* Cert. Pet App. at 101a-102a. Unable to fund the significantly increased overtime payments the Second Circuit's ruling mandates, providers will be forced to staff home companion cases on shorter shifts, thus requiring more caregivers per case. *Id.* at 103a. This will have numerous negative effects, including reducing the continuity of care to recipients of home companionship services, increasing the time needed to train multiple caregivers on the same case, increasing supervisor visits as new aides are added to cases, and reducing wages and other compensation to home care workers who will no longer be offered the opportunity to work overtime hours. Providers will also be forced to seek additional workers at a time when staffing shortages already exist, and when new regulatory requirements are further limiting the availability of workers. *Id.*

The Second Circuit's decision creates a circuit split on an issue of great significance to the Home Care Association and others with an interest in the provision of home companion services, and will effect a massive disruption to the delicately balanced system that makes home care—a desired alternate to institutionalization—an affordable and safe option for tens of thousands of home care patients in New York State. It also ignores the plain language of the statute, is contrary to Congress' intent, and violates numerous principles of administrative review that counsel particular deference to the agency under the circumstances of this case. This Court should therefore grant the Petition for Certiorari so that it may review and reverse the decision.

ARGUMENT

I. THE SECOND CIRCUIT'S DECISION CONTRAVENES ESTABLISHED PRINCIPLES OF ADMINISTRATIVE REVIEW AND AGENCY DEFERENCE, AND THUS IMPROPERLY SUBSTITUTES THE COURT'S OWN POLICY JUDGMENTS FOR THOSE OF CONGRESS AND THE AGENCY.

A. The Rule Invalidated By The Second Circuit Is Fully Consistent With The Text Of The Statute And Its Legislative History.

The statutory exemption at issue, codified at 29 U.S.C. § 213 (a)(15), applies to

> any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary) . . .

This statutory language applies by its terms to any employee providing companionship services in domestic service employment. It does not exclude employees from the exemption merely because they are employed by third parties. Nor, indeed, is there *any* statutory language that makes *any* reference to third party employers. The descriptions of the provision in the legislative history are likewise broad and make no reference to any such limitation of the statutory exemption.[4]

As summarized above and set out in detail in the materials submitted in the appendix to the Petition for Certiorari, the Second Circuit's ruling will greatly disrupt the provision of home companionship services in New York (and other states governed by the ruling), and adversely affect the very health care workers the decision purportedly seeks to protect by reducing their opportunities for overtime and hence their overall compensation. Yet this ruling is not based on either the plain language of the statute or any direct evidence of Congressional intent from the legislative history. Instead, the Second Circuit purported to find a basis for its decision in the "context of the entire statutory and regulatory scheme," Cert.

---

[4] *See* H.R. Rep. No. 93-913, (1974) *reprinted in* 1974 U.S.C.C.A.N. 2811, 2821 (noting that "the provision does not apply to a person who, on an intermittent basis, provides baby sitting services, or who provides companion services."); *id.* at 2842 ("the bill exempts from both the minimum wage and overtime requirements, however, babysitters employed on a casual basis and employees employed in the capacity of companion to an individual who, by reason of older age or infirmity, necessitates a companion."); *id.* at 2845 ("the exemption reflects the intent of the committee to exclude from coverage babysitters for whom domestic service is a casual form of employment and companions for individuals who are unable because of age and infirmity to care for themselves."); H. Conf. Rep. No. 93-953 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2862, 2865 ("The conference substitute retains the exemption for casual babysitters and companions contained in both bills and retains the overtime exemption for "live in" domestic employees.")

Pet. App. at 3a-4a, and in its assertion—again unsupported by anything in the Act's text or legislative history—that it is "implausible" Congress "would have wanted" any other result. *Id.* at 27a.

In concluding that it was "implausible" Congress "would have wanted" the rule, the Second Circuit side-stepped the undisputed fact that Congress has amended the Act *seven* times since the rule was promulgated in 1975, without disturbing the rule in any way.[5] Nor did the appeals court grant the agency's actions any appreciable deference, notwithstanding this Court's repeated admonitions that long-standing agency interpretations are to be given "particular deference." *See, e.g., Alaska Department of Environmental Conservation v. EPA*, 540 U.S. at 487 (quoting *Barnhart v. Walton*, 535 U.S. at 220, and *North Haven Board of Education v. Bell*, 456 U.S. 512, 522 n.12 (1982)). Instead, the court of appeals simply substituted its own view of Congress' purpose for that of the agency.

This Court has repeatedly held that the best evidence of Congressional intent is the words of the statute Congress enacted, not a court's own notion of what is or is not "plausible." "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. South Coast Air Quality*

---

[5] "It merits emphasis, however, that prolonged congressional silence in response to a settled interpretation of a federal statute provides powerful support for maintaining the status quo. In statutory matters, judicial restraint strongly counsels waiting for Congress to take the initiative in modifying rules on which judges and litigants have relied." *Hibbs v. Winn*, 542 U.S. 88, 124 S. Ct. 2277, 2292 (2004) (Stevens, J., concurring). Rather than give any weight to this familiar principle, the Second Circuit suggested that it somehow loses force if the entire statute is not reenacted, a non-sequiter for which the court offered no support. *See* Pet. Cert. App. 21a n.5.

Mgmt. Dist. 541 U.S. 246, 252 (2004)(quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)). *See BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004) ("The preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'"). "It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004)(quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A*, 530 U.S. 1 (2000)). *See also Chevron*, 467 U.S. at 845 (when Congress has not directly spoken to preclude an agency's policy choice, a court may not overturn agency action based on "its view the concept is 'inappropriate' in the general context").

The Second Circuit's discussion of "Congressional purpose" does not refer to the statutory language or legislative history at all, choosing instead to rely on the law "before the 1974 amendments" and on a single law review article. *See* Cert. Pet. App. at 26a-27a.[6] However, as this Court has noted, "[t]he starting point in discerning congressional intent is the existing statutory text, and not the predecessor statutes." *Lamie*, 540 U.S. at 534 (citation omitted). The statutory exemption contains no limitation denying the exemption for companionship services simply because the patient or his family prefers to use a third party provider.

The Second Circuit also ignored relevant legislative history that expressly recognizes the need to allow elderly and infirm individuals to remain in their own homes rather than being

---

[6] Although in a later portion of the opinion the Second Circuit chided the agency for supposedly ignoring the "plain language of the statute," the language to which it referred was *not* the language of the statutory exemption, but rather the language of an agency regulation that does not address the companionship exclusion. *See* Cert. Pet. App at 29a.

displaced to nursing homes. As noted in floor debate on the bill, compliance with federal wage and overtime requirements would "increase tremendously the cost of taking care of our older people, perhaps forc[ing] into nursing homes some of them who otherwise could be taken care of perfectly well in their own homes." 118 Cong. Rec. 24,715 (1972)(comments of Sen. Taft).[7] The rule invalidated by the Second Circuit is fully consistent with this purpose for the exemption.

In sum, the Second Circuit's discussion of Congress' supposed purpose was untethered to the actual language of the statutory exemption itself, or to any relevant legislative history of that provision. Indeed, far from precluding the agency's rule, both the statutory text and the legislative history support it, as neither suggests any limitation of the exemption based on whether the domestic companions are employed by the patient, the family, or a third party.

B. The Second Circuit Erred In Not Deferring To The Agency's Long-Standing Construction Of The Statute.

Implicitly recognizing that neither the plain language of the statute nor any statement in the legislative history precluded the result the agency reached in the rule, the Second Circuit devoted much of its opinion to a discussion of the appropriate level of deference owed the agency. *See Chevron*, 467 U.S. at 842-43 & n.9 (deference to the agency is required if "Congress has not directly addressed the precise question at issue"). The Second Circuit acknowledged that "[a]ll courts that have considered § 552.109(a) have accorded it *Chevron* deference." Cert Pet. App. at 21a. Nonetheless, the Second Circuit held that *Chevron* deference was not appropriate, and then proceeded to give the agency's rule effectively no

---

[7] The Second Circuit did, by contrast, explicitly consider statements from the legislative history in its discussion of 29 C.F.R. § 552.6, and upheld that regulation. *See* Cert. Pet. App. at 14a-15a, 17a-18a.

deference at all. The Second Circuit's analysis on this point was erroneous and inconsistent with the precedents of this Court and the rulings of other courts.

The Second Circuit's determination that *Chevron* deference was not required was based on its findings that the rule was "interpretive," rather than legislative, and that the notice and comment procedure undertaken by the agency "was not required." Cert. Pet. App. at 24a. Both of these conclusions were wrong, as was the Second Circuit's illogical leap from them to the further conclusion that the use of notice and comment procedures should not confer *Chevron* deference under *Mead* if the notice and comment is undertaken voluntarily.

The Second Circuit's holding that the rule was "interpretive" was based on the agency's placement of the rule under the heading "Subpart B- Interpretations," and on the agency's supposedly "self-conscious" admission that the rule was not issued under the delegated authority of 29 U.S.C. § 213(a)(15). Cert. Pet. App. At 22a-23a. The Second Circuit conceded, however, that the rule 'grants rights, imposes obligations, or produces other significant effects on private interests,' as legislative regulations do," *id.* at 22a, and that it "was promulgated following notice and comment procedures." *Id.* at 21a. Moreover, the effect of the rule is to define which employees providing companionship services are subject to the exemption—precisely the task that Congress delegated to the agency by statute. Other than its reliance on the agency's label, however, the Second Circuit did not explain why the rule defining companionship services should be considered legislative, while the rule exempting such services if provided in the home should be considered non-legislative. Indeed, under the Second Circuit's reasoning, the agency could have achieved full deference merely by relabeling the rule and adding a citation in the Federal Register.

The Second Circuit erred in relying on the agency's labeling of its rule, rather than on its substance and the actual circumstances of its issuance. Courts have made clear in a variety of contexts that the substance of an agency's rule governs, not its label. *See United States Telecom Ass'n v. FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005), ("fidelity to the rulemaking requirements of the APA bars courts from permitting agencies to avoid those requirements by calling a substantive regulatory change an interpretative rule"); *Appalachian Power* 208 F.3d at 1024 (it is "well-established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation;" question is whether the "interpretation" carries the "force and effect of law.") The Second Circuit was thus wrong to conclude that, because the rule was labeled "interpretive," the notice and comment procedures provided by the agency were gratuitous, and not required by law.

As noted above, the Second Circuit conceded that the rule affected substantive rights and obligations "as legislative regulations do." Cert. Pet. App. at 22a. Moreover, the binding nature of the rule is attested to by the Second Circuit's finding that its enforcement would preclude plaintiff's claims for minimum wage and overtime compensation, and the court of appeals' resulting need to declare that the rule "cannot be enforced." Cert. Pet. App. at 2a, 4a. The Second Circuit cited no authority supporting its conclusion that, under such circumstances, the rule was properly classified as "interpretive" and thus was not subject to notice and comment rulemaking.[8]

---

[8] The only case the Second Circuit cited on the point, *American Postal Workers' Union ("APWU") v. USPS*, 707 F.2d 548 (D.C. Cir. 1983), was decided before *Chevron* and did not deal with the question of deference at all. Unlike the present case, the rule at issue in *APWU* was *not* subjected to notice and comment rulemaking, and did not "fill in the gaps" because Congress had set out a detailed formula on the matter at issue rather than

In any event, even if there were a sound legal basis for the Second Circuit's conclusion that the agency's "self-conscious" labeling of the rule should be given effect, which there is not, the Second Circuit was simply wrong as a matter of fact in concluding that the agency did not issue the rule pursuant to the statutory authority it was expressly given by Congress to implement the companionship services exemption of the Act. As set forth in the Petition, at pages 17 to 21 & footnote 10, the agency has repeatedly and expressly maintained that it exercised its statutory authority in promulgating § 552.109(a).

The Second Circuit likewise offered no sound authority for its conclusion that *Mead* deference is inappropriate when notice and comment rulemaking is undertaken voluntarily, citing only a law review article that described the question as

---

expressly leaving the matter to agency rulemaking. *See APWU*, 707 F.2d at 559. Moreover, in *APWU*, the agency conceded it was not acting pursuant to statutory authority and was merely implementing a prior interpretation by the Comptroller General. Here, by contrast, the agency has expressly asserted that the rule "serves to 'define and delimit' the terms of the 'companionship services' exception under Congress' express delegation of authority," and provided full notice and comment. *See* Cert. Pet. App. at 66a. Moreover, even the case cited by the Second Circuit noted that "an agency's characterization of its own action is not conclusive," *APWU*, 707 F.2d at 559; yet as noted above, the Second Circuit relied on nothing else for its conclusion that the rule was interpretive and did not require notice and comment. The Second Circuit's reliance on the *APWU* case for this point is also inconsistent with later federal appellate precedent. *See, e.g., Pharmaceutical Research & Manufacturers of Am. v. Thompson*, ("*PRMA*"), 362 F.3d 817, 822 (D.C. Cir. 2004) ("Through this 'express delegation of specific interpretive authority,' *Mead*, 533 U.S. at 229, the Congress manifested its intent that the Secretary's determinations, based on interpretation of the relevant statutory provisions, should have the force of law. The Secretary's interpretations of the Medicaid Act are therefore entitled to *Chevron* deference.")

"within an area of uncertainty." Cert. Pet. App. at 25a & n.6.[9] *Mead* distinguished agency interpretations that result from considered determinations based on formal procedures, and that are intended to have precedential effect, from *ad hoc* determinations using informal procedures. *See, e.g., PRMA*, 362 F.3d at 822 n.5 (distinguishing the 10,000 to 15,000 *ad hoc* decisions per year, from 49 different offices, at issue in *Mead* from a uniform policy adopted through statutory interpretation that was entitled to *Chevron* deference). *Mead* does not suggest that the agency's use of formal procedures should be discounted merely because they are undertaken voluntarily.

The goal of the APA's notice and comment procedures is to "increase public participation and fairness in agency decisionmaking and to establish a mechanism by which an agency can improve its own information base." *National Family Planning and Reproductive Health Ass'n, Inc. v. Sullivan* 979 F.2d 227, 240 (D.C. Cir. 1992). That goal was met in this case when the agency, expressly charged by statute to define and delimit the scope of the domestic companionship exemption, increased public participation and improved its own information base through notice and comment rulemaking proceedings. The agency received substantial information as to the harms that would result if the exemption were applied to companionship services, and took this into account in its final rule. The resulting rule is fully deserving of *Chevron* deference under *Mead*.

Finally, the Second Circuit's suggestion that the agency's notice and comment procedures here were "idiosyncratic" and "insufficient" because the agency changed its mind

---

[9] Indeed, the court cited, but chose not to follow, another law review article concluding that an agency's use of notice and comment rulemaking procedures should offer it a "safe harbor" entitlement to *Chevron* deference under *Mead*.

during rulemaking is simply perverse. *See* Cert. Pet. App. at 24a. The point of public notice and comment procedures is that the agency can and should take the information it gains into account in a meaningful way. Rulemaking procedures would be empty exercises if an agency were not allowed to change its mind. As set out in the Petition, at page 20, footnote 11, as long as the agency identifies the matters at issue in its notice of rulemaking, which it indisputably did here, it is not required to set off a new round of rulemaking because it reaches a different result in the final rule from that it proposed. The notice of proposed rulemaking identifies the issues to be discussed; it does not compel a specific result.

In sum, the Second Circuit's analysis of the deference issue went seriously awry. Not only did it misapply *Chevron* and *Mead*, it ignored the substantial deference the agency's rule was due even under *Skidmore*, given that it had been in place without change for thirty years, and had been left undisturbed seven times by Congress. *See Alaska Department of Environmental Conservation*, 540 U.S. at 492-93 (affirming agency interpretation of "longstanding duration" under *Skidmore* because it was a "rational interpretation" of the statute.) The requirement of substantial deference to long-standing agency interpretations would be rendered meaningless if courts could, as occurred here, reject agency interpretations fully consistent with the statutory language by substituting their own views as to which Congressional purpose is most "plausible."

Unless corrected by this Court, the Second Circuit's erroneous deference analysis will apply to all APA cases in that circuit, and retain the potential to confuse courts in other circuits as well. The Petition thus raises an important question with respect to judicial review of the administrative construction of statutes generally, as well as presenting a matter of great importance to the many parties that have relied on the

specific agency rule that the Second Circuit improperly invalidated.

II. THE SECOND CIRCUIT'S DECISION WILL CAUSE A MASSIVE DISRUPTION TO THE PROVISION OF AFFORDABLE HOME CARE SERVICES IN NEW YORK STATE.

The agency issued 29 C.F.R. § 552.109(a) based on an extensive rulemaking record compiled in 1974 and 1975, *see* 40 Fed. Reg. 7404 (February 20, 1975), and reaffirmed it after taking extensive comments on a proposed amendment to the rule in 2001. *See* 67 Fed. Reg. 16,668 (April 8, 2002) (withdrawing proposed amendment). The rulemaking records contained substantial evidence of the harms that would ensue if the statutory exemption were construed to exclude providers of companionship services employed by third parties, and the agency noted that including such employees in the exemption was fully consistent with the statutory language. *Id.*

The court of appeals' decision, by contrast, was made on the basis of virtually no record, and does not discuss or even acknowledge the adverse effects of its ruling on providers and recipients of companionship services. Instead, its ruling was made on the basis of the pleadings alone, which as the District Court recognized, "provide little factual background." Cert. Pet. App. at 37a. As noted in the Petition, at pages 13, 23-26, the Second Circuit thus reached its ruling without considering numerous facts relevant to the regulation's "power to persuade" under *Skidmore*.[10] Moreover, when a

---

[10] Respondent opposed Petitioner's motion for judgment on the pleadings before the district court, but did not, at least as far as the district court opinion discloses, itself move for judgment on the pleadings or for summary judgment. Thus, at no point in the proceedings was Petitioner on notice that it had to advance all factual arguments in support of the regulation or face entry of judgment against it.

wide spectrum of governmental, nonprofit, and for-profit providers, including HCA, the City of New York, the Home Care Counsel of New York City, Inc., the National Association for Home Care & Hospice, Inc., the New York State Association of Health Care Providers, Inc., and the Continuing Care Leadership Coalition, learned of the Second Circuit's decision, and moved to file *amicus* briefs in support of the Petition for Rehearing setting out the numerous deleterious consequences of that decision, their motions were denied without explanation.[11]

As HCA and other entities attempted to set out in their *amicus* briefs in support of rehearing, and did set out in the declarations and other material supporting Petitioner's motion for stay of the mandate (which was granted), the Second Circuit's decision will decrease the availability of high quality home companionship services. For example, HCA President Carol Rodat has averred that "the effect of the Panel's decision would be to burden third-party employers providing home companionship services, to the extent that they will be unable to continue providing quality, affordable companionship services to elderly and infirm patients throughout New York State." Declaration of Carol Rodat ¶ 3, Cert. Pet. App. at 101a.

As noted in Ms. Rodat's declaration, the HCA's provider members already face severely constrained budgets due to their reliance on government reimbursement, predominantly through Medicaid, which is calculated on historical rather than current health care costs, and to overall deceases in government spending over the last decade. *Id.* ¶¶ 4-6, Cert.

---

[11] *See* Court of Appeals Docket No. 03-7666-cv, Orders of January 10, 2005, noting denials "endorsed on motion." Plaintiff brought this action as a "test case" against a small provider with limited resources, and HCA and other entities severely affected by the court of appeals' decision were unaware of the appeal until after the panel's decision issued.

Pet. App. at 101a-102a.[12] Providers' inability to fund increased overtime will require them to staff cases on shorter shifts, using a limited pool of workers willing to work those shifts. This will likely lead to gaps in coverage and hurt continuity of care as patients must contend with increased turnover in caregivers. *Id.* ¶¶ 7-8, Cert. Pet. App. at 103a. Patients suffering from Alzheimer's Disease and other forms of dementia generally receive full time care, and benefit particularly from close interaction with familiar caregivers. Increased turnover among health care workers also increases the burden on skilled nurses required to supervise each worker serving a client, further taxing the resources of provider agencies.

Ms. Rodat's declaration also notes that "[m]any patients may be forced into nursing homes if home care providers can no longer assure adequate and safe services." *Id.* ¶ 8, Cert. Pet. App. at 103a. Such a result is directly contrary to Congress' intent in exempting companionship services from the minimum wage and overtime requirements of the Act. As noted by the Ninth Circuit in *McCune v. Oregon Senior Services Division*, 894 F.2d 1107, 1110 (9th Cir. 1990),

> there are also sound policy reasons for applying the exemption to companions as defined by the Secretary. We are informed that these critical services reach more elderly or infirm individuals than they otherwise would precisely because the care-providers are exempt from the FLSA. We also note that many private individuals, who do not benefit from federal and state assistance, may also be forced to forego the option of receiving these services in their homes if the cost of the services increases. The only alternative for these individuals may be institutionalization.

---

[12] HCA has lobbied the State for increased funding to pay increased salaries for home care workers. *See* S. Greenhouse, *For Home Care Workers, A Fight for Pay, and Respect*, N.Y. Times, May 28, 2002, at B5.

The companionship exemption protects those who are disabled or chronically or acutely ill, as they can retain service for the hours needed with little, if any, disruption.

Recent developments further increase the pressures created by the Second Circuit's decision. This month, New York State implemented a requirement that all unlicensed personnel who have direct contact with patients in home care (and nursing homes) must be fingerprinted for a criminal history record check. *See* 10 N.Y.C.R.R. § 400.23. The new regulations also forbid the operator of a home care agency from hiring or using employees who have been convicted of certain crimes within the ten years prior to April 1, 2005. Employers may hire workers on a provisional basis while awaiting these background checks, but if they do so, the workers must be subject to random direct observation every week.

These requirements add new costs on providers and will exacerbate the shortage of home care workers, as the process is likely to take anywhere from 35 to 120 days or longer. Attrition will also increase as fewer home health care workers are given the opportunity to earn overtime. *See* Rodat Decl. ¶ 9, Cert. Pet. App. at 103a ("Limiting their hours will result in reduced wages as well as loss of benefits in certain situations, likely causing employee attrition and thus heightening the staffing shortage that already exists.")

The Second Circuit's decision will also harm those recipients of home companion services, and their families, who need those services provided in their homes, but who are unable or unwilling to act as the direct employer of the service provider. *See* Letter from Sen. Christopher S. Bond to Mr. Thomas M. Markey, dated July 26, 2001, Cert. Pet. App. at 120a-121a ("Many elderly do not care to be in this role, preferring the simplicity and reliability of using a third party who is in the business of supplying home care personnel. The reason for the proliferation of these companies is the sim-

plicity and reliability of service provided by them."). Many individuals are not physically or mentally able to engage in all the activities required to employ individuals directly to provide companionship services, including finding caregivers, confirming their qualifications and suitability, arranging to pay their wages and benefits, handling the required tax and other regulatory paperwork, and making sure that shifts are covered when the companion is sick or otherwise unavailable. Yet, under the Second Circuit's ruling, if those persons use a third party to handle these tasks they are now subject to dramatically increased costs through the application of federal wage and overtime laws. The agency has determined in the course of two extended rulemakings concerning 29 C.F.R. 552.109(a) that neither the statute nor sound policy require such a result.

In sum, the Second Circuit's ruling will create a massive and wholly unnecessary disruption to the system through which New York has provided important home care services for decades. In reliance on the agency's long-standing exemption of home companionship services from the Act, whether or not those services are provided by third party employers, and on Congress' long-standing refusal to upset this rule, New York has developed an effective network through which county social service agencies administer and supervise government-funded personal care programs, and under which Medicaid home care recipients are, with limited exceptions, receiving service from aides employed by home care providers licensed by the State of New York.[13] By reviewing and overturning the Second Circuit's erroneous ruling invalidating the rule, this Court would prevent significant disruptions to this system.

---

[13] *See* Michael S. Sparer, Medicaid and the Limits of State Health Reform 110-111 (1996)(describing New York City's efforts to channel government–funded home care services through third-party agencies).

CONCLUSION

Amicus respectfully submits that petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN LONGSTRETH *
PRESTON GATES ELLIS &
ROUVELAS MEEDS LLP
1735 New York Avenue, NW
Washington, DC 20006
(202) 628-1700

Counsel for Amicus Home Care Association of New York, Inc.

* Counsel of Record

April 29, 2005

(3)

Supreme Court, U.S.
FILED
APR 29 2005
OFFICE OF THE CLERK

No. 04-1315

IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD. and MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* HOME CARE COUNCIL OF NEW YORK CITY, INC. IN SUPPORT OF PETITIONERS

PETER G. BERGMANN
Counsel of Record
KATHY H. CHIN
STEPHANIE MARCANTONIO

CADWALADER, WICKERSHAM & TAFT LLP
One World Financial Center
New York, New York 10281
(212) 504-6000

Attorneys for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	3
I. THE FAILURE OF THE SECOND CIRCUIT TO ACCORD APPROPRIATE DEFERENCE TO AGENCY RULEMAKING HAS JEOPARDIZED THE CONTINUED PROVISION OF VITAL HOME HEALTH SERVICES	3
A. Judicial Deference To Agency Expertise Has Its Basis In Sound Policy	3
B. The Second Circuit Decision Will Have A Severe Negative Impact On Home Health Care Services If Not Reversed	6
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 5

Coke v. Long Island Care at Home, Ltd., 267 F. Supp. 2d 332 (E.D.N.Y. 2003), *aff'd in part, vacated in part*, 376 F.3d 118 (2d Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3603 (U.S. Mar. 29. 2005) (No. 04-1315) 4, 5, 6

Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999) 8

Skidmore v. Swift, 323 U.S. 134 (1944) 5, 6

FEDERAL STATUTES & REGULATIONS

29 C.F.R. § 552.109(a) 4, 6, 9

66 Fed. Reg. 5,481 (Jan. 19, 2001) 5

67 Fed. Reg. 16,668 (Apr. 8, 2002) 5

OTHER MATERIALS

Alene Hokenstad *et al.*, *Medicaid Home Care Services in New York City: Service Utilization & Family Involvement* (United Hosp. Fund of N.Y. May 1998) 7

IN THE

Supreme Court of the United States

No. 04-1315

LONG ISLAND CARE AT HOME, LTD. and
MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* HOME CARE COUNCIL OF NEW YORK CITY, INC. IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37(2)(a) of the Rules of this Court, this brief is respectfully submitted on behalf of *amicus curiae* Home Care Council of New York, Inc. in support of the Petition for a Writ of Certiorari filed by Petitioners Long Island Care at Home, Ltd. and Maryann Osborne. The consent of the parties to the filing of this brief has been received, and has been submitted to the Court.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, its counsel, and the affiliate of one of its

The Home Care Council of New York City, Inc. ("HCC") is the largest professional home care organization of any metropolitan city in the nation. Founded in 1983, HCC is a not-for-profit professional association of home health care providers, and currently includes among its members 64 proprietary and not-for-profit, community-based service providers operating in the five boroughs of New York City. Together, HCC members provide over $1 billion in home care services on an annual basis to more than 70,000 elderly, disabled and frail New York City residents.

Through contracts with the City of New York's Human Resources Administration, 51 of HCC's not-for-profit members provide personal care services to Medicaid-eligible New York City residents. HCC member agencies employ over 75,000 personal care aides, commonly referred to as home attendants. These workers, who are specially certified under New York State law, may not perform the medically-related activities that a home health aide is trained to perform, but provide often invaluable assistance with patients' activities of daily living and personal care, assistance that can mean the difference between living independently at home and moving into a nursing home for an elderly New Yorker.

HCC provides advocacy and educational opportunities for its members, and previously submitted an *amicus* brief to the United States Court of Appeals for the Second Circuit in support of Petitioners' application for rehearing of that Court's July 22, 2004 decision herein, which invalidated the regulation that exempts home health care workers employed by third-party employers from federal wage and overtime pay requirements. Leave to file the *amicus* brief was denied by the Court of Appeals. HCC respectfully submits this brief in order to present to the Court the unique perspective of its

---

members, Visiting Nurse Service of New York, made a monetary contribution to the preparation or submission of this brief.

members—home health care providers to a Medicaid-eligible patient base operating under contract with a governmental agency.

SUMMARY OF ARGUMENT

By striking down a regulation that had been in effect for 30 years, the Second Circuit improperly substituted its judgment for that of the agency charged with implementing and administering the regulation. The Court of Appeals' failure to accord the proper level of deference to the administrative agency resulted in a ruling that is already having a profound effect on the provision of home health care services in New York City and, if not reversed, will negatively affect the provision of essential services to the elderly, disrupt the continuum of care, and impair the collective bargaining agreements of New York City home health agencies with their labor unions, all without improving the financial circumstances of home health workers.

ARGUMENT

I. THE FAILURE OF THE SECOND CIRCUIT TO ACCORD APPROPRIATE DEFERENCE TO AGENCY RULEMAKING HAS JEOPARDIZED THE CONTINUED PROVISION OF VITAL HOME HEALTH SERVICES

A. Judicial Deference To Agency Expertise Has Its Basis In Sound Policy

In its memorandum and order granting the motion of Petitioners for judgment on the pleadings, the United States District Court reached the following conclusion with respect to the deference owed by the courts to the United States Department of Labor ("DOL"):

> The DOL's interpretation of Section 213(a)(15) [of the Fair Labor Standards Act ("FLSA")] in 1975 evidence that it believed the regulations were proper at the time

> the 1974 amendments were enacted. The DOL's withdrawal of the proposed amendments [in 2002] shows that it still believes that these long-standing regulations are appropriate in the current home healthcare environment. Despite amending Section 213(a)(15) seven times since [1974], Congress has chosen not to act. While this Court is sympathetic to home care workers who perform such laborious work under difficult circumstances, the judiciary is not in a position to strike a regulation which is reasonable in light of the DOL's explicit Congressional mandate.

Coke v. Long Island Care at Home, Ltd., 267 F. Supp. 2d 332, 341 (E.D.N.Y. 2003), *aff'd in part, vacated in part*, 376 F.3d 118 (2d Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3603 (U.S. Mar. 29, 2005) (No. 04-1315). As the District Court thus pointed out, DOL has on at least two occasions subjected the regulation at issue to intense scrutiny, once upon its promulgation and again more recently, when consideration was given to its possible amendment. Under the circumstances, deference to the agency's considered judgment would seem appropriate not only as a matter of sound application of administrative law principles, but also as a matter of public policy.

Amicus respectfully submits that in reversing the District Court's decision with respect to 29 C.F.R. § 552.109(a), the Second Circuit has improperly substituted its judgment for that of the administrative agency. Even while noting that an agency action that is "'the fruit[] of notice-and-comment rulemaking or formal adjudication'" should generally be accorded *Chevron* deference, and even while acknowledging that Section 552.109(a) was promulgated following notice and comment, the Court of Appeals declined to accord such deference, deeming the notice and comment procedure "substandard." 376 F.3d 130-31 (citation omitted).

Whether or not it was "substandard", the notice and comment procedure did provide the agency with the kind of

information that must enter into the rulemaking process. As the District Court pointed out, when DOL withdrew the proposed amendments to Section 552.109(a) in April 2002, it did so because "'numerous commenters on the proposed rule, including multiple federal agencies . . . seriously called into question the Department's conclusion that there would be little economic impact.'" 267 F. Supp. 2d at 338 (*quoting* 67 Fed. Reg. 16,668 (Apr. 8, 2002)). DOL terminated the proposal, thereby choosing to leave the regulation in the form first adopted in 1974 and abandoning the amendments, which had been proposed in the Federal Register on January 19, 2001. *See* 66 Fed. Reg. 5481 (Jan. 19, 2001). DOL made this determination in the exercise of its expertise and on the basis of the "rulemaking record as a whole." *See* 67 Fed. Reg. 16,668. For the Second Circuit to strike this regulation down in a case that has not yet proceeded beyond the pleading stage not only flies in the face of established precedent, but also illustrates why judicial deference to agency expertise is appropriate.

Agencies have an expertise in their fields that judges and even legislators do not necessarily possess, and are generally in the best position to determine how a proposed rule will affect the industry and the public. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984). In *Chevron*, the respondents argued that the agency's interpretation was not entitled to deference because its latest interpretation represented a sharp break from its prior interpretations. This Court disagreed, noting that "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 863-64. DOL has done precisely that in the circumstances of this case. Nevertheless, its views have been rejected by the Second Circuit. Even in *Skidmore v. Swift*, 323 U.S. 134 (1944), where this Court declined to defer to the agency's interpretations, this Court recognized that an administrator's policies are based on expertise in the

field. *Id.* at 140 ("But the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case"). In this particular instance, the Second Circuit could not know what DOL learned from the notice-and-comment proceedings, that is, the enormous impact that the invalidation of Section 552.109(a) would have on the home health care industry.

B. The Second Circuit Decision Will Have A Severe Negative Impact On Home Health Care Services If Not Reversed

As the District Court herein pointed out in its analysis of Congressional intent:

> In regards to Section 552.109(a), the Court notes that the reasoning behind the companionship services exemption is arguably to allow those in need of such services to be able to find such assistance at a price they can afford. Whether that service is provided by the direct hiring of an employee or through the use of an agency, the objective is still the same; to allow for the procurement of companionship services without being required to meet the minimum wage and overtime provisions of the FLSA.

267 F. Supp. 2d at 340. This reasoning holds especially true for the patients served by the members of HCC in New York City: where companionship services are being paid for from already stretched Medicaid budgets, continued exemption from the minimum wage and overtime provisions of the FLSA is essential, and clearly in accord with the Congressional intent to enable those who need home care services to obtain it.

Over the past decade, New York has cut Medicaid home care funding by an estimated $1 billion. *See* Appendix to the Petition for a Writ of Certiorari ("Cert. Pet. App.") at 107a.

Already the State and local administrators of the Medicaid program have had to cut back on home care services, often reducing the hours of service that the Medicaid program will cover. After the Second Circuit decision herein was issued in July 2004, the effort to reduce possible overtime liability led to further efforts to reduce service hours, and unless the Second Circuit decision is reversed, the outlook for continued service to the Medicaid-eligible patients cared for by HCC member agencies is bleak indeed. The City has estimated that the Second Circuit's decision will increase the cost of its personal care program by over $263 million annually. Cert. Pet. App. at 93a.

While efforts can be made to cap hours to reduce overtime costs, reduction of covered hours can be devastating for patients and their families. More than half of Medicaid home care recipients in New York City have some degree of cognitive impairment, and thirty percent have moderate to severe cognitive impairment. Alene Hokenstad *et al.*, *Medicaid Home Care Services in New York City: Service Utilization & Family Involvement* 12 (United Hosp. Fund of N.Y. May 1998). Changing from a single familiar attendant on duty for twelve hours to multiple short shifts of attendants is a disruption of routine that can be disturbing for such patients. The reduction of covered hours is a cause of distress for home health care workers as well. Home health care workers generally prefer longer-hour cases. A twelve-hour shift enables the worker to develop the kind of relationship with a patient that best serves the needs and privacy concerns of the patient, and relieves the worker from shuttling across the city from patient to patient to make up a full day's work. Shorter shifts also pose problems in other ways, as servicing a single patient with multiple workers may require an increased number of supervisory visits from registered nurses. With a recognized acute shortage of nurses, an increased need for nurses in one sector of the health care system affects availability in other sectors as well.

If home health care services must be reduced in the City, the effect will be far-reaching. Hospitals seeking to comply with pressure to discharge patients earlier will find that there is no home health care service to discharge the patient to; patients without family to fill the gap will find themselves in nursing homes where the cost to the Medicaid system is typically greater than the cost to maintain the same patient at home. Arguably, this last unintended effect of the *Coke* decision is inconsistent with New York's efforts to comply with this Court's decision in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999).

If the companionship exemption is no longer available to third-party agencies, then the only employers who will be able to hire home health workers without being subject to FLSA requirements will be the patient and the family of the patient. Arranging for home health care for a patient involves: (1) finding a qualified home attendant, which includes checking qualifications and screening out applicants with criminal backgrounds; (2) hiring that person, which includes negotiating wages, arranging for workers' compensation and withholding of taxes; and (3) establishing schedules and coverage for situations when the chosen worker does not arrive as scheduled. These steps, in conjunction with the complexities of adherence to the requirements of government-funded programs, are burdens that most patients and their families simply cannot be expected to assume. Agencies such as HCC's members perform a vital function in the provision of home health care in New York City; without their expertise, the system would founder.

In short, unless the Second Circuit decision herein is reversed and the exemption restored, the sudden increase in costs to the home health system will pose grave difficulties to Medicaid-funded home health care and ultimately to other Medicaid-funded services as well. Longer stays in hospitals and increased admissions to nursing homes for Medicaid-

eligible patients mean a funneling of patients to more expensive forms of care. Moreover, patients will suffer loss of their independence and the lot of home health workers will not be appreciably improved. Without money budgeted for overtime, employers will have to reduce shifts to avoid overtime. Collective bargaining agreements developed with the principal labor union based in New York State that represents home care workers, Local 1199, will have to be renegotiated, as these agreements do not assume applicability of FLSA requirements. Benefits previously granted in such agreements may have to be reconsidered.

Because of the limited nature of the record before the Second Circuit when it rendered its decision, the Court of Appeals could not be aware of the far-reaching impact of its invalidation of 29 C.F.R. § 552.109(a). Under the circumstances, deference to the Department of Labor would have been the appropriate course. *Amicus curiae* Home Care Council of New York City respectfully requests that this Court grant certiorari both to emphasize the dangers inherent in striking down a long-established regulation and to remedy the immediate situation created by the Second Circuit decision.

CONCLUSION

For all of the foregoing reasons, and those stated in the Petition, we respectfully request that this Honorable Court grant the Petition for a Writ of Certiorari.

Dated: New York, New York
April 29, 2005

Respectfully submitted,

PETER G. BERGMANN
Counsel of Record
KATHY H. CHIN
STEPHANIE MARCANTONIO

CADWALADER, WICKERSHAM & TAFT LLP
One World Financial Center
New York, New York 10281
(212) 504-6000

Attorneys for Amicus Curiae

FILED
MAY 2 - 2005
OFFICE OF THE CLERK

(2)

No. 04-1315

IN THE
Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD. AND MARYANN OSBORNE
Petitioners

- v. -

EVELYN COKE
Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF NATIONAL ASSOCIATION FOR HOME CARE & HOSPICE, INC. AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

WILLIAM A. DOMBI
CENTER FOR HEALTH CARE LAW
228 SEVENTH STREET, SE
WASHINGTON, DC 20003
(202)547-5262

Attorney for Amicus Curiae
National Association for Home Care & Hospice

No. 04-1315

IN THE
Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD. AND MARYANN OSBORNE
Petitioners

- v. -

EVELYN COKE
Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF NATIONAL ASSOCIATION FOR HOME CARE & HOSPICE, INC. AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

WILLIAM A. DOMBI
CENTER FOR HEALTH CARE LAW
228 SEVENTH STREET, SE
WASHINGTON, DC 20003
(202)547-5262

Attorney for Amicus Curiae
National Association for Home Care & Hospice

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

RULE 29.6 STATEMENT iv

INTEREST OF THE AMICUS CURIAE 1

ARGUMENT 2

A. REVIEW BY THE U.S. SUPREME COURT IS WARRANTED SINCE THE QUESTIONS PRESENTED HAVE SIGNIFICANT NATIONAL IMPACT

1. THE ORGANIZATION AND FINANCING OF HOME CARE SERVICES WILL BE ADVERSELY IMPACTED BY THE DECISION OF THE COURT OF APPEALS 2
2. THIRD PARTY PAYMENT SYSTEMS ARE POORLY EQUIPPED TO REACT ON A TIMELY BASIS TO UNEXPECTED COST INCREASES 3

B. REVIEW IS NEEDED TO RESOLVE THE SPLIT IN THE DECISIONS OF THE COURTS OF APPEALS 5

C. THE DECISION OF THE COURT OF APPEALS ERADICATES THE PURPOSE AND VALUE OF PUBLIC PARTICIPATION IN RULEMAKING 5

CONCLUSION 8

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Arkansas Medical Society, Inc. v. Reynolds, 6 F. 3d 519 (8th Cir. 1993) 4

Ball, et al v. Bledess, et al, CIV-00-0067-TUC-EHC (D. AZ 8/13/04) 4

Coke v. Long Island Care at Home, Ltd., 03-7666, 2004 U.S. App LEXIS 15191, 2004 WL 16332642 (2nd Cir. 2004) 1

Johnston v. Volunteers of America, Inc., 213 F. 3d 559 (10th Cir. 2000) 5

Orthopedic Hospital v. Belshe, 103 F. 3d 1491 (9th Cir. 1997) 4

FEDERAL STATUTES AND REGULATIONS

42 USC §1395fff 3

42 USC §1396a(a)(30)(A) 4

42 USC §1396h(c) 4

29 CFR §552.109 ..... 2, 5

32 CFR Part 199 4

42 CFR §447.204 4

42 CFR §484.200 3

42 CFR §484.225 3

42 CFR §484.210(c) 3

69 F.R. 31248 3

69 F.R. 44942 4

RESOURCE MATERIAL

2000 National Home and Hospice Care Survey, U.S. Department of Health and Human Services 2

Centers for Medicare & Medicaid Services, Office of the Actuary, Medicare & Medicaid Cost Estimates Group 2

Centers for Medicare & Medicaid Services, MSIS, (www.cms.hhs.gov) 3

Occupational Employment Statistics, U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, May 2003 (www.bls.gov) 3

Centers for Medicare & Medicaid Services, Center for Information Systems, Health Standards and Quality Bureau, January 2004 3

RULE 29.6 STATEMENT

This statement is submitted pursuant to Rule 29.6.

National Association for Home Care & Hospice, Inc. ("NAHC") is a not-for-profit organization incorporated under the laws of the District of Columbia. NAHC states that it has no parent corporation and no publicly held corporation owns any of its stock.

INTEREST OF THE AMICUS CURIAE

The National Association for Home Care & Hospice, Inc. (NAHC) is a not for profit trade association representing the interests of nearly 6,000 home and community based health care providers throughout the nation. NAHC submits this proposed amicus[1] curiae brief in support of the Petition for Writ of Certiorari by Long Island Care at Home regarding the July 22, 2004 panel decision of the United States Court of Appeals for the Second Circuit in *Coke v. Long Island Care at Home, Ltd.* (No. 03-7666), 2004 WL 1632642 (2nd Cir. 2004). [2]

NAHC has directly participated in legislative and regulatory matters involved in the companionship services exemption under the Wage & Hour law of the Fair Labor Standards Act that is at issue in this matter. NAHC members across the United States and the millions of individuals who receive their services face a risk of severe adverse impact through the Court of Appeals decision.

The Second Circuit's decision will pose a risk to the continued viability of home care services, raising costs for home care providers, increasing reimbursement obligations for government and private third-party payers, forcing undesired limits on the working hours of caregivers, and impeding access to the care settings of choice for millions of elderly and disabled citizens.

NAHC urges this Court to grant the Petition for Writ of Certiorari in order for this vital matter to receive the necessary review of significant legal and public policy concerns.

---

[1] *Amicus* certifies that this brief was authored in whole by Counsel for *Amicus* and no part of the brief was authored by any attorney for a party. No other person of entity made any monetary contribution to the preparation or submission of this brief.

[2] The written consents of the parties were requested and all parties have consented in writing to the filing of this brief. Copies of the written consents have been filed with the Clerk of the Court.

ARGUMENT

A. Review by the U.S. Supreme Court is Warranted Since the Questions Presented Have Significant National Impact.

1. The organization and financing of home care services will be adversely impacted by the decision of the Court of Appeals.

The Second Circuit ruling invalidated a 30 year old rule that had been the subject of two separate and extensive public rulemaking proceedings. In doing so, the Second Circuit, in a matter involving one individual and one employee, set in motion systemic changes to a health care delivery system that will cause serious impact on care recipients, caregivers, and the payers of services. Millions of this nation's elderly and disabled will be affected. Likewise public programs funding billions of dollars of home-based personal care services will face huge, unexpected cost increases.

Serious consideration must be given to the traumatic impact that the invalidation of 29 CFR §552.109(a) could have on care recipients, caregivers, and financing sources for that care. That impact cannot be understated.

Companionship services, otherwise known in health care as aide and personal care attendant services, are provided to millions of Medicare, Medicaid, TRICARE, and private pay recipients of care. They are young and old, permanently disabled and chronically ill. In 2000, the U.S. Department of Health and Human Services reports that the number of individuals receiving home care services was 7,178,964.[3]

In 2002, Medicare expenditures for home health services provided to 2,724,000 beneficiaries totaled $9,635,000,000.[4] Medicaid expenditures for home care in

---

[3] *2000 National Home and Hospice Care Survey*, U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, CD-ROM Series 13, No. 31 (July 2002).

[4] Centers for Medicare & Medicaid Services, Office of the Actuary, Medicare & Medicaid Cost Estimates Group, February 2004.

2000 reached $24.3 billion, of which $11.6 billion was spent on personal support services.[5]

The U.S. Department of Labor, Bureau of Labor Statistics, reports that 583,880 workers provide companionship services as home health aides and personal care aides.[6] Among the employers of these workers are 7,265 Medicare certified home health agencies throughout the country.[7]

On their own, these statistics demonstrate that the court's ruling can have unforeseen and unintended adverse consequences well beyond the individual petitioner and respondent. A review by this Court that will allow for the opportunity to consider these elements of the rulemaking process and others is well warranted.

2. Third party payment systems are poorly equipped to react on a timely basis to unexpected cost increases.

Medicare pays for home health services through a prospective payment system, 42 USC §1395fff; 42 CFR §484.200 (HHPPS). The HHPPS payment rate is adjusted annually through the application of a "market basket index," a sort of inflation factor. 42 USC §1395ffff(b)(3)(B); 42 CFR §484.225.

However, the market basket index formula and the database utilized to apply that formula are not designed to address sudden cost changes without unreasonable delay. For example, the database utilized for the inflation factor for the calendar year 2005 proposed rates includes wages and salary data from 2000. 69 F.R. 31248 (June 2, 2004).

Compounding the problems with the Medicare market basket index update is the use of a wage index for geographic variation in payment rates. 42 USC §1395fff(b)(4)(A)(ii)i; 42 CFR §484.210(c). However,

---

[5] Centers for Medicare & Medicaid Services, MSIS (formerly HCFA-2082) (www.cms.hhs.gov) September 2003.

[6] *Occupational Employment Statistics*, U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, May 2003 (www.bls.gov).

[7] Centers for Medicare & Medicaid Services, Center for Information Systems, Health Standards and Quality Bureau, January 2004.

changes in home care aide wages will not affect payment rates because the home health wage index is based upon hospital services wage data.

Medicaid payment systems are even less predictable than the Medicare HHPPS. States participating in Medicaid are required to establish payment rates sufficient to enlist enough care providers to secure services at a level of access comparable to the non-Medicaid patient population. 42 USC §1396a(a)(30)(A); 42 CFR §447.204. Typically, state Medicaid programs adjust payment rates only after individuals have lost access to necessary care. See, *Arkansas Medical Society, Inc. v. Reynolds*, 6 F.3d 519 (8th Cir. 1993); *Orthopedic Hospital v. Belshe*, 103 F.3d 1491 (9th Cir. 1997).

In *Ball, et al v. Bledess, et al*, the District Court held that the Arizona Medicaid program home care payment rates violated 42 USC §1396a(a)(30)(A). CIV 00-0067-TUC-EHC (D. AZ. 8/13/2004). The court noted that despite multiple studies and reports since 1998 indicating the loss of access to care triggered by inadequate payment rates, the state did not respond.

Many of the Medicaid home care programs are designed around a standard of cost effectiveness. These programs, otherwise known as home and community-based care waivers exist only to the extent that the cost of care is less than the cost of placement in an institutional setting. 42 USC §1396h(c) The increase in costs triggered by new overtime compensation obligations threatens the viability of these waiver programs and will block home and community-based care options for currently served individuals.

TRICARE, the health services program for over eight million military dependents and retirees will also be adversely impacted. Its basic home health services program is built on the Medicare payment model referenced above. 32 CFR Part 199. In addition, its Extended Home Care Benefit is founded on cost-effectiveness principles comparable to the Medicaid waiver programs discussed herein. 69 F.R. 44942 (July 28, 2004).

B. Review is Needed to Resolve the Split in the Decisions of the Courts of Appeals.

Supreme Court review is essential when the Circuit Court of Appeals have issued rulings on federal law in direct conflict with each other. Here, the Second Circuit invalidated 29 CFR §552.109(a) based on its unwillingness to afford proper deference to the U.S. Department of Labor's rulemaking powers and the longstanding assent to DoL's rule by Congress. However, the Tenth Circuit has previously held that the same rule is valid and enforceable, granting deference to the federal agency's rulemaking actions. *Johnston v. Volunteers of America, Inc.*, 213 F. 3d 559,562 (10th Cir. 2000)

That conflict leads to nationwide confusion regarding the responsibilities of home care providers and the risk of wage related liabilities that they may face. Those uncertainties are not in the best interests of their patients and care recipients. Similarly, the uncertainties caused by the split in the court's impact of health care financing and planning by Congress, state legislatures, and third party payers across the nation. Supreme Court review of this matter is necessary

C. The Decision of the Court of Appeals Eradicates the Purpose and Value of Public Participation in Rulemaking.

The 2001 proposed rule that would have ended the application of the third party employment rule drew an unusually diverse set of public comments that had obvious impact on the Department of Labor's ultimate withdrawal of the proposed rule.

On two occasions, Senator Christopher S. Bond (R-MO), Chairman of the Committee on Small Business of the United States Senate, wrote to the U.S. Department of Labor urging reconsideration of the proposed rule to modify the Companionship Services Exemption. In his July 26, 2001 letter, Chairman Bond indicated that the proposed redefinition of the Companionship Services Exemption and the elimination of its application to employees employed by a third party employer "directly contradicts the intent of Congress when it passed the

amendments in 1974 which included this exemption." He further states that, "this proposal attempts to achieve through regulation what the previous administration was not able to achieve through legislation." Cert. Pet. App. at 120a-121a.

Chairman Bond also took great issue with the department's finding that the regulation would have little impact on the economy, calling it "nonsensical." With particular focus on the proposal to eliminate the use of the exemption for third party employers, Chairman Bond expressed great concern for the consumers of the services stating that "these services are likely to be significantly more expensive than these elderly individuals can afford, thus requiring them to become the employer instead of contracting with a third party employer. Many elderly do not care to be in this role, preferring the simplicity and reliability of using a third party who is in the business of supplying home care personnel." Id.

These concerns are mirrored in other comments submitted by the Administration on Aging of the U.S. Department of Health and Human Services, the U.S. Small Business Administration and the Ohio Department of Mental Retardation and Developmental Disabilities, and the National Association of State Directors of Developmental Disabilities Services

NAHC also participated in the rulemaking process on the companionship services exemption. This rulemaking afforded NAHC and others a crucial opportunity to voice interests and concerns regarding the proposed rule. However, with the Second Circuit's failure to provide any deference to the Secretary, the public comments were effectively disregarded. The standard of deference that the Supreme Court has long applied in federal agency rulemaking serves not only to recognize the expertise and responsibilities of that agency, it also provides voice to those in the public who participated in the process. With the Second Circuit's uniquely composed analysis of deference, the public participation element of the rulemaking process is rendered meaningless. In the event that the decision is allowed to stand, the message to the public will be to test the validity of a proposed rule in court before investing in rulemaking participation. The Second Circuit's decision is a clear indication that the

federal judiciary has a greater voice in rulemaking than does the public.

Here, the public participants in the rulemaking were broad-based and diverse, including a union representing employed companions, government payers of companion services, members of Congress, a government rule watchdog (SBA), and employers of companions. However, after multiple amendments to the Fair Labor Standards Act, and public rulemaking endeavors in 1975 and 2001, the Second Circuit found that no deference is due the Secretary's 30 year regulation. It is necessary for the Supreme Court to address the significant issues posed by an appellate decision that has the practical affect of rendering a transparent, public rulemaking process a meaningless exercise for the federal agency and the participating commenters on the proposed rules.

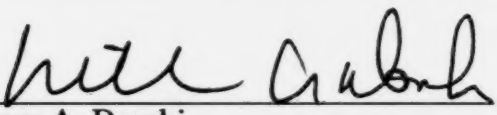
CONCLUSION

NAHC urges this court to grant the Petition for Writ of Certiorari.

Dated: April 29, 2005, Washington, DC

Respectfully Submitted,

CENTER FOR HEALTH CARE LAW

By 
William A. Dombi

228 Seventh Street, SE
Washington, DC 20003
Tel. (202)547-5262
Fax (202)547-7126
Email: wad@nahc.org

Attorney for Amicus Curiae
National Association for Home Care
& Hospice, Inc.

(8)

No. 04-1315

Supreme Court, U.S.
FILED
APR 29 2005
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

LONG ISLAND CARE AT HOME, LTD. and
MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICI CURIAE CITY OF NEW YORK AND NEW YORK STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

STEPHEN J.A. ACQUARIO,
General Counsel,
Attorney for Amicus Curiae
NYS Ass'n of Counties,
111 Pine Street
Albany, NY 12207
(518) 465-1473

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
Attorney for Amicus Curiae
City of New York,
100 Church Street
New York, NY 10007
(212) 788-1159 or 1065

LEONARD J. KOERNER*
PAMELA SEIDER DOLGOW,
SUSAN CHOI-HAUSMAN,
of Counsel.

*Counsel of Record

April 29, 2005

TABLE OF CONTENTS

	Page
Table of Authorities	iii
Preliminary Statement	1
Interest of the Amici Curiae	2
Summary of the Argument	4
REASONS FOR GRANTING THE PETITION	5
I. THE ENFORCEABILITY OF THE THIRD-PARTY EMPLOYER REGULATION IS OF GREAT IMPORTANCE	5
A. Economic Implications of the Circuit's Decision	5
1. Paid Overtime	6
2. "Sleep-In" Cases	6
3. Travel Time	8
B. Implications for the Provision of Care	8
1. Privacy in the Home	9
2. Continuity of Care	10
3. Family Compatibility	11

II. THERE IS A DIRECT CONFLICT IN THE CIRCUITS AS TO THE DEGREE OF DEFERENCE TO BE ACCORDED THE THIRD-PARTY EMPLOYER REGULATION. 12

III. THE SECOND CIRCUIT'S DECISION IS ERRONEOUS AND MISAPPLIED THIS COURT'S PRECEDENTS REGARDING THE DEFERENCE TO BE ACCORDED ADMINISTRATIVE DETERMINATIONS. 13

CONCLUSION..... 18

TABLE OF AUTHORITIES

Cases **Page**

Alaska Dep't of Envtl. Conservation v. Envtl. Protection Agency, 540 U.S. 461 (2004) 16

Barnhart v. Walton, 525 U.S. 212 (2002).....15

Batterton v. Francis, 432 U.S. 416 (1977).....16

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)..... 12-14

Christensen v. Harris County, 529 U.S. 576 (2000)..... 12-13, 16

Johnston v. Volunteers of Am., Inc., 213 F.3d 559 (10th Cir. 2000), cert. denied, 531 U.S. 1072 (2001).....12

Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121 (1997).....16

Skidmore v. Swift & Co., 323 U.S. 134 (1944).....12

United States v. Mead Corp., 533 U.S. 218 (2001).....12, 14

Washington State Dep't of Social and Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371 (2003)..... 15-16

Yellow Transp., Inc. v. Michigan,
537 U.S. 36 (2002) 16

Statutes and Other Authority

29 C.F.R. 552.109 2

29 U.S.C. §213(a)(15) 2

Richard J. Pierce, Admin. L. Treatise (4th ed. 2002) 15

No. 04-1315

IN THE
SUPREME COURT OF THE UNITED STATES

LONG ISLAND CARE AT HOME, LTD. and
MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICI CURIAE CITY OF NEW YORK AND NEW YORK STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The City of New York (the "City") and the New York State Association of Counties ("NYSAC") submit this brief in support of the petition for a writ of certiorari in this case. Both parties have consented to the filing of this brief, and their consent letters are being filed herewith.[1]

[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amici curiae* and their counsel, made a monetary contribution to the preparation and submission of this brief.

INTEREST OF THE AMICI CURIAE

The City and NYSAC have a significant interest in having this Court grant the petition and determine the validity of 29 C.F.R. 552.109(a) -- a longstanding United States Department of Labor regulation (hereinafter the "third-party employer regulation") that applied the "companionship services" exemption in the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §213(a)(15), to employees engaged in providing companionship services and "employed by an employer or agency other than the family or household using their services."

The provision of health care services in the home has increased significantly in recent years. Since the early 1980's, hospital services have become much more intensive, and daily costs have escalated enormously. At the same time, many aspects of care formerly provided in hospitals and in long term care institutions can be effectively provided in the home. Vulnerable individuals most frequently prefer to receive care at home if possible, and this has resulted in the development of a number of programs to facilitate their ability to do so. The cost of these programs is largely covered by various forms of health insurance, including Medicaid.

The City, the nation's largest municipality, oversees a Medicaid-funded program, which provides personal care services to approximately 50,000 low-income frail elderly and disabled individuals, annually, through the use of approximately 60,000 personal care aides, commonly referred to as home attendants. These personal care services are delivered through contracts with over 90 provider agencies throughout the City.

Pursuant to this program, Medicaid-eligible individuals can obtain assistance with activities of daily living (bathing, toileting, transferring, walking and nutrition) when these services are medically needed to

allow them to continue to live at home. Personal care services must be ordered by a client's personal physician, and the determination of the medically-necessary level of care to be provided to Medicaid clients is the responsibility of the City's Human Resources Administration.

Medicaid clients may be authorized to receive personal care services for periods of time ranging from 2 or 3 hours, two or three times per week, to continuous oversight, 24 hours each day, for impaired individuals. A home attendant may be required to sleep in the home and, in many ways, become a member of the household. The home attendant may accordingly be scheduled to deliver service for many more than 40 hours per week, and while these services must be medically required, they also require a substantive level of compatibility with the client and the client's family.

As a result of the third-party employer regulation, prior to the Second Circuit's decision declining to enforce that regulation, the home attendants were not subject to the wage and overtime requirements of the FLSA, and the annual cost to the Medicaid program of the City's personal care services program was approximately $1.6 billion dollars.

NYSAC is a not-for-profit municipal corporation incorporated pursuant to the laws of the state of New York. The sole membership of NYSAC consists of the 62 counties in New York state. NYSAC is the only statewide municipal association representing elected county executives, county supervisors, legislators, representatives, commissioners, and administrators from the 62 counties, including the 5 counties comprising the City. NYSAC's activities involve essential governmental functions, and all of its activities, including the filing of this amicus brief, accrue to the benefit of all county governments in the state. Outside the City, each of NYSAC's member counties

provides Medicaid-funded personal care services in its respective jurisdiction throughout the state.

The Second Circuit's decision declining to enforce the third-party employer regulation will have serious ramifications for the Medicaid-funded programs, in terms of both cost and the provision of care, for everyone involved in the program, including the government, the providers of service, the home attendants, and individuals receiving personal care services. Therefore, the enforceability of the third-party employer regulation is of vital importance to the City and NYSAC.

SUMMARY OF THE ARGUMENT

The petition should be granted for three reasons. First, the enforceability of the third-party employer regulation is of profound importance, because it has serious implications for the Medicaid-funded personal care services programs, such as those administered by the City and the counties. The Second Circuit's decision is expected to tremendously increase the annual cost of the programs, and it is unclear whether additional funding will be available to cover these cost increases. While the costs arguably could be limited somewhat by capping each home attendant's hours of service at 40 hours per week, the intimate and ongoing nature of the home attendant/client relationship, as well as clients' general unwillingness to have more than one or two attendants in the home, limit the ability to have multiple home attendants providing care to a client without jeopardizing the client's welfare.

Second, there is a direct conflict in the Circuits as to the degree of deference to be accorded the third-party employer regulation, with the result that the Tenth Circuit has upheld the regulation, while the Second Circuit declined to enforce the regulation. Third, the Second Circuit's decision is erroneous and misapplied this Court's

precedents regarding the amount of judicial deference to be accorded administrative determinations.

This case merits this Court's guidance and the exercise of this Court's supervisory powers.

REASONS FOR GRANTING THE PETITION

I. THE ENFORCEABILITY OF THE THIRD-PARTY EMPLOYER REGULATION IS OF GREAT IMPORTANCE.

The Second Circuit's decision, declining to enforce the third-party employer regulation, is of profound importance, in that it has serious implications for the Medicaid-funded personal care services programs administered by the City and the counties in New York state, in terms of both cost and the provision of care.

A. Economic Implications of the Circuit's Decision

In the City alone, the Second Circuit's decision is estimated to increase the cost of the City's Medicaid-funded personal care program to the elderly and disabled by over $279 million annually.[2] The City's Medicaid funding will need to increase from $1.592 billion to about $1.871 billion annually in order to sustain its current client service levels. As set forth below, the estimated additional $279 million annual cost consists primarily of: (1) overtime pay at time and one-half for home attendants who work in excess of 40 hours weekly; (2) an increase in billable and overtime hours for 24 hour daily care provided by "sleep-

[2] In the Circuit, the City had estimated an increased annual cost of over $263 million. The new numbers reflect the City's most recent figures.

in" home attendants; and (3) travel time, which will now have to be paid to attendants who serve more than one client and travel between cases.

1. Paid Overtime

The City currently authorizes the delivery of approximately 105,778,000 hours of service annually to approximately 45,000 personal care service clients. Services to most of these clients are rendered by not-for-profit providers operating under the invalidated third-party employer exemption. The City's Human Resources Administration staff estimates that approximately 24,000 clients require more than 40 hours of personal care services per week and that 19% of the personal care service hours provided in City Fiscal Year 2004 were provided by attendants working in excess of 40 hours weekly.

These hours would be subject to overtime pay under the Second Circuit's decision. The estimated incremental cost of overtime is approximately $103 million annually.

2. "Sleep-In" Cases

Among the innovations developed by the City to facilitate delivery of personal care services to its frail and vulnerable residents is a service modality known as "sleep-in" service. Under this approach, a home attendant stays with a client for a 24-hour period, during which time the attendant is on paid duty for 12 hours, and is off duty for the remaining 12 hours, and is provided with sleeping accommodations during this time. The "sleep-in" attendant may be roused up to three times during the unpaid hours, and so is available to assist the client with special needs, such as toileting or turning, during the night-time hours. Typically these services are provided by two home attendants during the week -- one of whom stays with the client for five 24-hour periods, and the other for the

remaining two. This program is well accepted by both clients and home attendants, and reflects the close relationship that is appropriately developed between them.

The City currently has approximately 5,400 clients who receive 24 hour daily care from home attendants who "sleep-in". These sleep-in home attendants are present 24 hours daily and receive an hourly wage for each of 12 hours; they are not compensated for the 12 hour "sleep-in" portion of the day but, rather, receive a daily shift differential. Provider agencies are authorized to bill Medicaid for 84 hours weekly (12 hours daily x 7 days) for these cases.

Pursuant to the Second Circuit's decision, the non-paid "sleep-in" hours would be limited to 8 hours daily under the FLSA. See 29 C.F.R. §785.22 (explaining generally that, where an employee is required to be on duty for 24 hours or more, a bona fide sleeping period of not more than 8 hours may be excluded from hours worked and that interruptions of sleep by a call to duty must be counted as hours worked). Accordingly, the provider agency service payment authorization for these cases would have to be increased from 12 to at least 16 hours daily. These additional 4 hours daily for these cases will increase the billable hours for the City's contracted home attendant provider agencies by 7,841,660 hours annually, with a resulting additional annual cost to the government of approximately $120.9 million for straight-time service.

Further, the additional paid hours on these sleep-in cases will also have an overtime impact since the home attendants presently servicing these cases are already working hours that would be subject to overtime pay if this Court's ruling is upheld. Accordingly, the additional hours subject to wages on the sleep-in cases will also be subject to paid overtime. The cost of the overtime (i.e., the

additional one-half-time cost) for these hours is about $40 million annually.

3. Travel Time

The City's Medicaid-funded personal care service program includes approximately 12,300 clients who receive an average of 21 hours of service weekly. Many of the home attendants service more than one of these cases in order to earn a full-time wage.

Presently, home attendants' wages are limited to hours actually worked; the home attendant is not paid for the time spent traveling between cases. Pursuant to the Second Circuit's decision, the time spent in transit by these employees will be subject to wages under the FLSA. See 29 C.F.R. §785.38 (explaining generally that travel time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the work day, must be counted as hours worked). The City's Human Resources Administration staff conservatively estimates the annual cost to government as about $13.3 million.

In short, the economic impact of the Second Circuit's decision is tremendous.

B. Implications for the Provision of Care

It is unclear whether the additional funding to cover the increased costs will be available.

As to the personal care services program overseen by the City, 50% of the cost is covered by the federal government, 40% by the state, and 10% by the City. The City negotiates the hourly rates for each provider prospectively and then submits them to the state for

approval. The City has submitted a request to the state for increased rates, in light of the Second Circuit's decision, and is awaiting the state's determination. If the request is not approved and additional funding is not appropriated by the state in its budget, the providers will have no funding source to pay the additional costs to comply with the FLSA.

It might be argued that some of the costs outlined above could be avoided by limiting the hours of service provided to an individual client by a home attendant to a maximum of 40 hours per week. Thus, for example, a client requiring 24 hour coverage would be served by multiple home attendants. However, there are substantive reasons why this is not readily doable. The relationship between a home attendant and the client, while not limited to delivery of companionship, nonetheless is one of special intimacy and confidentiality. Building such a relationship is not a simple matter, and clients are in general unwilling to enter into such a relationship with more than one or two individuals. Some of the issues affecting this relationship are discussed below.

1. Privacy in the Home

Although the home attendant's role is to provide paraprofessional service to a client, the service setting differs significantly from a hospital or a doctor's office, in that the service is rendered in the client's home, and the nature of the service is intensely personal. The home attendant spends up to 24 hours each day in the client's home, tending to needs of an extremely personal nature, such as bathing or toileting. It is therefore essential for the home attendant to build a trusting personal relationship with the client, as otherwise the attendant's presence will be seen as being overly intrusive, and the client will not cooperate or allow the necessary level of personal intervention.

Home attendants are trained and assisted to present themselves professionally to the client. However, to carry out personal care services appropriately also requires acceptance of the home attendant by the client. In many instances it takes a considerable time to build such a relationship, and clients often are very unwilling to enter into such a relationship with more than one or two such individuals. Experience shows that clients often are unwilling to accept alternative coverage when a home attendant takes vacation or sick leave, preferring to suffer lack of what may often be very necessary care until the person with whom the client is comfortable returns from leave.

2. Continuity of Care

Although the services provided by the home attendant are limited to assistance with activities of daily living, clients receiving this care are frail elderly and/or disabled, and the service has been determined to be medically necessary. Clearly, all clients are impaired to some extent through ongoing illness and disability, and these problems may well result in additional, immediate clinical needs. The home attendant is required to become familiar with the client's medical circumstances, to assist the client in making physician visits, and to promptly identify and report any changes in the client's clinical status. The home attendant must engage in ongoing interaction with the client regarding the client's health status: to do this requires that the client is comfortable with the home attendant and has confidence in sharing intimate information. The home attendant must be knowledgeable about the client's clinical arrangements, and must be able to contact the relevant medical professional if necessary.

3. Family Compatibility

In many instances, clients live in the home with other family members. The home attendant's services are limited to caring for the client, but the attendant must be able to render these services in a way that does not result in problems in the household. Building such domestic relationships can be difficult and time-consuming. In other instances, the client may live alone. It then becomes the responsibility of the home attendant to assure that the client maintains adequate relationships with children, siblings, etc., and to assist with family relationships in a way that meets the client's requirements and expectations. Such relationships can be demanding and difficult, and the home attendant is required always to place the client's needs before those of the family members who may be placing pressures on both the attendant and the client. If the client's family is unwilling to allow multiple attendants in the home, the family may insist that the client is transferred to a nursing home.

In short, the inherently intimate and ongoing nature of the relationship between the home attendant and the client, as well as clients' unwillingness to have multiple attendants in the home, limit the ability to provide multiple attendants for each client, in order to keep costs down.

This Court should review the Second Circuit's decision, given the serious implications in terms of both cost and the provision of care for the Medicaid-funded personal care services programs administered by the City and the counties in New York State.

II. THERE IS A DIRECT CONFLICT IN THE CIRCUITS AS TO THE DEGREE OF DEFERENCE TO BE ACCORDED THE THIRD-PARTY EMPLOYER REGULATION.

The Second Circuit's decision as to the degree of deference to be accorded the third-party employer regulation conflicts directly with that of the Tenth Circuit in *Johnston v. Volunteers of Am., Inc.*, 213 F.3d 559 (10th Cir. 2000), *cert. denied,* 531 U.S. 1072 (2001). In *Johnston*, the Tenth Circuit accorded the third-party employer regulation deference pursuant to this Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and upheld the regulation. *See Johnston*, 213 F.3d at 561-62. In this case, by contrast, the Second Circuit declined to accord the third-party employer regulation *Chevron* deference, applied the less-deferential standard of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and declined to enforce the regulation. *See Coke*, Pet App. at 19a-29a.

While the Second Circuit attempted to distinguish *Johnston* on the ground that it pre-dated this Court's decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001) (*see* Pet. App. at 21a-22a), as explained by this Court, "*Chevron* did nothing to eliminate *Skidmore's* holding that an agency's interpretation may merit some deference whatever its form," or "to eliminate *Skidmore's* recognition of various justifications for deference depending on statutory circumstances and agency action." *Mead*, 533 U.S. at 234, 236-38.

Indeed, in cases following *Chevron* but pre-dating the Tenth Circuit's decision in *Johnston*, this Court applied the less-deferential *Skidmore* standard, in reviewing certain administrative determinations. *See, e.g., Christensen v.*

Harris County, 529 U.S. 576, 586-87 (2000) (applying the less-deferential *Skidmore* standard in reviewing a Department of Labor opinion letter). Thus, the fact that the Tenth Circuit's decision in *Johnston* pre-dated this Court's decision in *Mead* does not in any way minimize the direct conflict between the Circuits.

III. THE SECOND CIRCUIT'S DECISION IS ERRONEOUS AND MISAPPLIED THIS COURT'S PRECEDENTS REGARDING THE DEFERENCE TO BE ACCORDED ADMINISTRATIVE DETERMINATIONS.

The Second Circuit's decision is erroneous and misapplied this Court's precedents regarding the deference to be accorded administrative determinations.

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court upheld a regulation of the Environmental Protection Agency, on the ground that it was a permissible construction of the Clean Air Act. This Court explained that, if Congress has not directly spoken to the precise question at issue and has delegated to an agency to elucidate a specific statutory provision, the agency's regulation, which is then considered legislative, must be given controlling weight, unless it is arbitrary, capricious, or manifestly contrary to the statute. *Id.* at 842-44. This Court noted that the fact that the agency has from time to time changed its interpretation does not mean that the agency's interpretation is not entitled to deference. This Court emphasized that an agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. *Id.* at 863-64. Additionally, this Court noted that an agency to which Congress has delegated policymaking responsibilities may, within the limits of its delegation, properly rely on the

incumbent administration's view of wise policy to inform its judgments. *Id.* at 865-66.

In *United States v. Mead Corp.*, 533 U.S. 218 (2001), this Court held that a tariff classification in a U.S. Customs Service ruling letter regarding day planners was not entitled to *Chevron* deference. This Court explained that *Chevron* deference applies when the statute is ambiguous, Congress has delegated authority to the agency to make rules carrying the force of law, and the agency interpretation was promulgated in the exercise of that authority. *Id.* at 226-27, 229.

This Court, in holding that *Chevron* deference did not apply, relied on the facts that there was no indication that Congress meant to delegate authority to Customs to issue ruling letters with the force of law and that the ruling letter: was not subject to a notice and comment procedure; did not go beyond the specific case under review and did not bind third parties; was subject to modification without notice, except to those persons to whom the letter was addressed; could be issued by any of 46 different Customs offices, which issued approximately 10,000 to 15,000 such letters per year; and did not have to be published. *Id.* at 223-24, 230-34.

In this case, pursuant to the above standards, the third-party employer regulation was entitled to *Chevron* deference. There is no dispute that the companionship exemption expressly delegated authority to the Department of Labor to define and delimit the terms "companionship services" and "domestic service employment." *See* 29 U.S.C. §213(a)(15); *Coke*, Pet. App. at 20a, 23a. Additionally, as explained by petitioners, the Department of Labor third-party employer regulation was promulgated in the exercise of that authority, where: the third-party employer regulation expressly relies on the companionship exemption; Part 552 of the regulations indicates that the

companionship exemption was the authority for all of the regulations in that part; and the Department of Labor, in its rulemaking and brief, has proclaimed that the third-party employer regulation was a legislative regulation promulgated pursuant to the Congressional delegation. *See* Pet. at 18-22.

Unlike in *Mead*, the administrative determination at issue here is a regulation, not a letter ruling, and carries the force of law, in that it: is published and was subject to the notice and comment procedures; goes beyond one case and binds all employees of third-party employers; and has been in force for thirty years without change, notwithstanding that Congress has on numerous occasions amended 29 U.S.C. §213, which contains the companionship exemption. Thus, the Second Circuit misconstrued *Mead* in erroneously declining to accord the third-party employer exemption *Chevron* deference. *See also* Richard J. Pierce, *Admin. L. Treatise* §6.4 at 324-25 (4th ed. 2002) (explaining that legislative rules have binding effect, are required to be promulgated pursuant to notice and comment procedures, are within the scope of rulemaking authority conferred by Congress, and impose distinct obligations on members of the public).

Indeed, further supporting the proposition that the Second Circuit misapplied this Court's decision in *Mead* is the fact that, following *Mead*, this Court does not appear to have declined *Chevron* deference to any similar regulation. *See, e.g., Washington State Dep't of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 382, 390 (2003) (holding that *Chevron* deference was owed to the regulations of the Commissioner of Social Security); *Barnhart v. Walton*, 535 U.S. 212, 217-22, 224-25 (2002) (same and explaining that *Chevron* was the appropriate standard, given "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to the administration of the statute, the complexity

of that administration, and the careful consideration the Agency has given the question over a long period of time"); *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 41, 45-48 (2002) (according *Chevron* deference to Interstate Commerce Commission regulations, which were issued pursuant to an express delegation by Congress, after notice and comment proceedings, and differed from the regulation originally proposed).

Chevron deference appears to have been declined only to internal guidance memoranda and interpretations contained in publicly available operating instructions for processing social security claims, which were not the product of formal rulemaking. *See Alaska Dep't of Envtl. Conservation v. Envtl. Protection Agency*, 540 U.S. 461, 487-88 (2004); *Washington State Dep't of Social and Health Servs.*, 537 U.S. at 385-86.

This post-*Mead* treatment of such regulations is consistent with other pre-*Mead* cases. *See, e.g., Christensen v. Harris County*, 529 U.S. 576, 586-88 (2000) (emphasizing that "[o]f course, the framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation"); *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (noting that no deference was required to the interpretation of the Administrative Procedure Act by the Director of the Office of Workers' Compensation Programs, where, *inter alia*, that interpretation was not embodied in any regulation or similar binding policy pronouncement to which *Chevron* deference would apply); *Batterton v. Francis*, 432 U.S. 416, 425-26 & n.9 (1977) (a pre-*Chevron* case noting that courts are not required to give effect to interpretive regulations, but emphasizing that where Congress expressly delegated to an agency to prescribe standards or interpret statutory terms, the agency adopts regulations with legislative effect, which are entitled to review under the arbitrary and capricious standard).

In short, the Second Circuit erred and misapplied this Court's precedents when it declined to accord *Chevron* deference to the Department of Labor's third-party employer regulation. The third-party employer regulation is reasonable, especially where, as noted by the District Court and explained by the Department of Labor, part of the reasoning behind the FLSA companionship services exemption is to allow those in need of such services to find assistance at a price they can afford and prevent them from unnecessarily being forced into long-term care institutions. As emphasized by the District Court, whether the services are provided by direct hiring or through the use of an agency, the objective is still the same: to allow the procurement of companionship services without being required to meet the minimum wage and overtime provisions of the FLSA. *See* Pet. App. at 52a, 63a, 70a-71a.

In order to avoid repetition, the amici curiae adopt the other arguments made by petitioners in support of a grant of certiorari.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

STEPHEN J.A. ACQUARIO,
General Counsel,
Attorney for Amicus Curiae
NYS Ass'n of Counties,
111 Pine Street
Albany, NY 12207
(518) 465-1473

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
Attorney for Amicus Curiae
City of New York,
100 Church Street
New York, NY 10007
(212) 788-1159 or 1065

LEONARD J. KOERNER*
PAMELA SEIDER DOLGOW,
SUSAN CHOI-HAUSMAN,
of Counsel.

*Counsel of Record